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IN THE DISTRICT COURT OF JOHNSON COUNTY, KANSAS

MARK R. SCHMID)	
13021 Larsen)	
Overland Park, KS 66213)	
)	
Plaintiff,)	
)	Case No.:
v.)	
)	Court No.:
THE CITY OF OVERLAND PARK, KANSAS,)	
Please Serve City Clerk:)	Pursuant to K.S.A. Chapter 60
Elizabeth Kelly)	
8500 Santa Fe Drive)	
Overland Park, KS 66212)	
)	
)	
and)	
)	
STEPHEN M. HOWE, DISTRICT ATTORNEY)	
OF JOHNSON COUNTY, KANSAS)	
101 North Kansas)	
Olathe, KS 66061)	
)	
Defendants.)	

PETITION FOR DECLARATORY AND INJUNCTIVE RELIEF AND
ATTORNEY'S FEES

COMES NOW Plaintiff Mark R. Schmid, by and through his attorney of record, Maxwell E. Kautsch of Kautsch Law, LLC, and for his causes of action against Defendants, the City of Overland Park, Kansas and Stephen M. Howe, District Attorney of Johnson County, Kansas,

alleges and states as follows:

FACTS COMMON TO ALL COUNTS

1. Plaintiff is a citizen and resident of Overland Park, Johnson County, Kansas, residing at 13021 Larsen, Overland Park, KS 66213.
2. Defendant, the City of Overland Park, Kansas, is a municipal corporation duly organized and existing under and by virtue of the constitution and laws of the State of Kansas.
3. Defendant, the City of Overland Park, Kansas, is a “public agency” as that term is used in K.S.A. 45-217(f)(1) and as such, is subject to the provisions of the Kansas Open Records Act (“KORA”), K.S.A. 45-215, *et seq.*
4. The Overland Park Police Department is a constituent public agency of the City of Overland Park, Kansas, and as such, is subject to the provisions of the Kansas Open Records Act (“KORA”), K.S.A. 45-215, *et seq.*
5. At all times referenced herein, Defendant Stephen M. Howe was, and currently is, the elected District Attorney of Johnson County, Kansas and, pursuant to K.S.A. 22a-101(a), is the executive officer of the 10th Judicial District.
6. The office of District Attorney of the 10th Judicial District constitutes a separate entity within the 10th Judicial District.
7. The office of District Attorney of the 10th Judicial District is a “public agency” as that term is used in K.S.A. 45-217(f)(1) and as such, is subject to the provisions of the Kansas Open Records Act (“KORA”), K.S.A. 45-215, *et seq.*
8. In the early evening of January 20, 2018, John Albers, who was a 17 year-old high school student, was home alone.

9. While on social media, he threatened to kill himself while in the midst of a mental health crisis.
10. An adult learned of this threat and notified the Overland Park Police Department.
11. Police officers were thereafter dispatched to the Albers' home for purposes of a welfare check regarding John Albers.
12. Two of the officers arrived at approximately the same time, got out of their vehicles and approached the Albers' home.
13. One of the officers returned to his vehicle. At the same time, the other officer, Clayton Jenison, moved from his position in the Albers' front yard, toward their house.
14. As he did so, the Albers' garage door began to rise and Officer Jenison un-holstered his service weapon and continued toward the garage door.
15. It took approximately nine seconds for the Albers' garage door to fully open.
16. Once the garage door opened, the minivan began backing out of the garage.
17. As the minivan backed on to the driveway, Officer Jenison fired his weapon twice into the minivan.
18. The minivan stopped momentarily, but then made a U-turn in the open driveway/yard area of the Albers' property.
19. After the minivan completed the U-turn, Officer Jenison stood on the passenger side of the vehicle as it traveled past him toward the house.
20. Officer Jenison fired eleven more shots at the minivan.
21. The minivan then coasted across the street, where it stopped in a neighbor's front yard.
22. John Albers died as a result of the gunshot wounds he sustained during the incident.

23. On January 20, 2018, following the shooting, the Public Information Officer for the Overland Park Police Department, John P. Lacy, issued a Media Release regarding the shooting of John Albers on Facebook, Twitter and Instagram. A copy of such Media Release is attached hereto as Exhibit A.
24. The release provided in part as follows: “As the responding officers approached the residence to make contact, the garage door opened and a vehicle exited the garage, moving rapidly toward one of the responding officers.”
25. On January 24, 2018, Carl Gerlach, the Mayor of Overland Park, Kansas, posted a statement on the City’s Facebook page regarding the Albers killing reading in part: “At this time the Johnson County Officer Involved Shooting Investigation Team (OISIT) is conducting a criminal investigation, and the Overland Park Police Department is cooperating fully. The findings of this investigation will then be submitted to Johnson County District Attorney for review. These findings will be made public at the appropriate time. In addition, the Overland Park Police Department will be conducting its own internal investigation.”
26. On or about February 20, 2018, Johnson County District Attorney Stephen M. Howe held a press conference regarding the Albers killing.
27. At such press conference, District Attorney Howe issued a document titled “Media Fact Sheet—Press Conference” regarding the Albers killing. A copy of such is attached hereto as Exhibit B.

28. The “Media Fact Sheet” stated that based on his review of the incident, the officer’s “use of force was justified under Kansas law” and “no criminal action would be taken” against him.
29. Also at the District Attorney’s press conference, District Attorney Howe played edited and redacted portions of two dashboard camera videos that depicted the killing of John Albers.
30. There were at least three other videos that depicted the events leading up to and of the killing of John Albers that were available to District Attorney Howe that were not played at the press conference of February 20, 2018.
31. Also at the District Attorney’s press conference of February 20, 2018, Overland Park Police Chief Frank Donchez, stated that the shooting had been investigated by the department’s Professional Standards Unit and that his department would be reviewing its use of force policy. A copy of Chief Donchez’ statement of February 20, 2018 is attached hereto as Exhibit C.
32. Chief Frank Donchez also stated during the press conference that Officer Jenison had resigned for personal reasons.
33. On or about April 10, 2018, following a public hearing on Commission on Accreditation for Law Enforcement Agencies (CALEA) accreditation for the Overland Park Police Department, Overland Park spokesman Sean Reilly wrote an email to the *Kansas City Star*. A copy thereof is attached hereto as Exhibit D.
34. Therein, Mr. Reilly wrote “The Police Department is actively reviewing its use of force policy. Changes to the prohibited use of deadly force portion of the policy are being

considered. In addition, our training regarding use of force are also being reviewed and changes are being considered.”

35. Mr. Reilly also wrote that “An internal review of whether or not policy was followed is still pending.”
36. On May 9, 2018, Plaintiff began directing a series of requests to Defendants under the Kansas Open Records Act (KORA), some of which were granted, others of which were denied.
37. At all material times, Elizabeth Kelly was the City Clerk for the City of Overland Park, Kansas and was designated its Freedom of Information Officer.
38. At all material times, Kristi Bergeron was the Administrative Assistant to Johnson County District Attorney, Stephen M. Howe, and was designated as the Freedom of Information Officer for the District Attorney’s Office.

May 11, 2018 KORA request to the City of Overland Park, Kansas

39. On or about May 11, 2018, Plaintiff submitted a request to Defendant, the City of Overland Park, Kansas, via email under the KORA for “‘Long Form’ Response to Resistance Administrative Investigative Report prepared in connection with the use of deadly force incident of January 20, 2018 involving Officer Clayton Jenison and John Albers pursuant to Overland Park Police Department Standard Operating Procedure No.: 2330, effective 8/31/16.” A copy of Plaintiff’s email containing that request is attached hereto as Exhibit E.
40. In that same May 11, 2018, email, Plaintiff submitted a request to Defendant the City of Overland Park, Kansas, under the Kansas Open Records Act for “Any document

communicated to the appropriate Division Commander expressing any policy concerns created by the response to resistance incident of January 20, 2018 involving Officer Clayton Jenison and John Albers pursuant to Overland Park Police Department Standard Operating Procedure No.: 2330, effective 8/31/2016.”

41. Also in that same May 11, 2018, email, Plaintiff submitted a request to Defendant, the City of Overland Park, Kansas, under the Kansas Open Records Act for “Any document reflecting the review of the response to resistance incident of January 20, 2018 involving Officer Clayton Jenison and John Albers by the member's Section Manager or shift Watch Commander pursuant to Overland Park Police Department Standard Operating Procedure No.: 2330, effective 8/31/16.”
42. Also in that same May 11, 2018, email, Plaintiff submitted a request to Defendant, the City of Overland Park, Kansas, under the Kansas Open Records Act for “Any document reflecting a determination by the member's Section Manager or Watch Commander of whether the response to resistance incident of January 20, 2018, involving Officer Clayton Jenison and John Albers was in compliance with policy pursuant to Overland Park Police Department Standard Operating Procedure No.: 2330, effective 8/31/16.”
43. Also in that same May 11, 2018, email, Plaintiff submitted a request to Defendant, the City of Overland Park, Kansas, under the Kansas Open Records Act for “Any document generated from a Board of Review convened as a result of the response to resistance incident of January 20,2018 involving Officer Clayton Jenison and John Albers pursuant to Overland Park Police Department Standard Operating Procedure No.: 2330, effective 8/31/16.”

44. In a letter dated May 17, 2018, Defendant, the City of Overland Park, Kansas, denied each of the requests set forth in paragraphs 39-43 on the grounds that the Overland Park Police Department is not required to disclose personnel records under K.S.A. 45-221(a)(4). A copy of that letter is attached hereto as Exhibit F.
45. On May 17, 2018, following receipt of the City of Overland Park's denial, Plaintiff asked for clarification of the specifics of the denial. A copy of the email is attached hereto as Exhibit G.
46. On May 21, 2018, Brandon Kohake, the Records Supervisor for the Overland Park Police Department responded to Plaintiff's request for clarification of the Defendant's denial. In such response, Kohake indicated that Plaintiff's requests were denied on the basis that they sought personnel records. A copy of such response is attached hereto as Exhibit H.
47. Thereafter, Plaintiff sent additional correspondence to the Defendant's representatives including outside counsel, Mike Seck, in an effort to appeal Defendant's denial. Copies of such correspondence between Plaintiff and Defendant's representatives are attached hereto as Exhibit I.
48. On July 31, 2018, Defendant's counsel, Mike Seck, advised that, "The City stands by its denial." Copies of such correspondence between Plaintiff and Defendant's representatives are attached hereto as Exhibit J.

July 2, 2018 KORA request to the City of Overland Park, Kansas

49. On or about July 2, 2018, Plaintiff submitted a request to Defendant, the City of Overland Park, Kansas, via email under the KORA for "Any employment related contract between Clayton Jennison and the City of Overland Park, Kansas and/or the City of Overland Park

Police Department, regarding his resignation from employment as an officer of the Overland Park Police Department effective March 4, 2018.” A copy of Plaintiff’s email containing that request is attached hereto as Exhibit K.

50. On or about July 20, 2018, Defendant denied the request, citing K.S.A. 45-221(a)(4), 45-221(a) (30), K.S.A. 45-221(a)(2), *Mason v. Stock*, 869 F. Supp. 828 (D. Kan. 1994), and K.S.A. 45-221(a)(3). A copy of Defendant’s email containing that denial is attached hereto as Exhibit L.

July 6, 2018 KORA request to the City of Overland Park, Kansas

51. On or about July 6, 2018, Plaintiff submitted a request to Defendant, the City of Overland Park, Kansas, via email under the KORA for “The document, memorandum, or the like, setting forth the findings of the administrative investigation of the officer involved shooting of January 20, 2018.” A copy of that email is attached hereto as Exhibit M.
52. On or about Wednesday, July 25, 2018, Defendant denied the request under K.S.A. 45-221(a)(4). A copy of that email is attached hereto as Exhibit N.
53. Also on or about July 6, 2018, Plaintiff submitted a request to Defendant, the City of Overland Park, Kansas, via email under the KORA for “A copy of the original case file provided to the Overland Park Police Department by the Johnson County Officer Involved Shooting Investigation Team, pursuant to it's [sic] protocol and procedures with regard to the officer involved shooting of January 20, 2018.” A copy of that email is attached hereto as Exhibit M.
54. On or about August 6, 2018, Defendant denied the request under K.S.A. 45-221(a)(2), (3), (10), (10)(F), (14), and (30). A copy of that email is attached hereto as Exhibit O.

February 1, 2019 KORA request to the City of Overland Park, Kansas

55. On or about February 1, 2019, Plaintiff submitted a request to Defendant, the City of Overland Park, Kansas, via email under the KORA for “The dashboard camera video from Unit 240 taken on January 20, 2018 in connection with its response to being dispatched to 9309 W. 149th Terrace, Overland Park, Kansas.” A copy of that email is attached hereto as Exhibit P.
56. On or about February 19, 2019, Defendant denied the request under K.S.A. 45-221(a)(10)(A). A copy of that email is attached hereto as Exhibit Q.
57. Also on or about February 1, 2019, Plaintiff submitted a request to Defendant, the City of Overland Park, Kansas, via email under the KORA for “The dashboard camera video from Unit 237 taken on January 20, 2018 in connection with its response to being dispatched to 9309 W. 149th Terrace, Overland Park, Kansas.” A copy of that email is attached hereto as Exhibit P.
58. On or about February 19, 2019, Defendant denied the request under K.S.A. 45-221(a)(10)(A). A copy of that email is attached hereto as Exhibit Q.
59. Also on or about February 1, 2019, Plaintiff submitted a request to Defendant, the City of Overland Park, Kansas, via email under the KORA for “The dashboard camera video from Unit 234 taken on January 20, 2018 in connection with its response to being dispatched to 9309 W. 149th Terrace, Overland Park, Kansas.” A copy of that email is attached hereto as Exhibit P.
60. On or about February 19, 2019, Defendant denied the request under K.S.A. 45-221(a)(10)(A). A copy of that email is attached hereto as Exhibit Q.

61. Also on or about February 1, 2019, Plaintiff submitted a request to Defendant, the City of Overland Park, Kansas, via email under the KORA for “Any document maintained by the Overland Park Police Department indicating that a background check was made on Officer Clayton Jenison prior to his being hired by the Overland Park Police Department.” A copy of that email is attached hereto as Exhibit P.
62. On or about February 19, 2019, Defendant denied the request under K.S.A. 45-221(a)(4). A copy of that email is attached hereto as Exhibit Q.
63. Also on or about February 1, 2019, Plaintiff submitted a request to Defendant, the City of Overland Park, Kansas, via email under the KORA stating, “If a background check was made on Officer Clayton Jenison prior to his being hired, a copy of that document.” A copy of that email is attached hereto as Exhibit P.
64. On or about February 19, 2019, Defendant denied the request under K.S.A. 45-221(a)(4). A copy of that email is attached hereto as Exhibit Q.
65. Also on or about February 1, 2019, Plaintiff submitted a request to Defendant, the City of Overland Park, Kansas, via email under the KORA for “Any document maintained by the Overland Park Police Department indicating that a pre-employment psychological examination was made of Officer Clayton Jenison prior to his being hired by the Overland Park Police Department.” A copy of that email is attached hereto as Exhibit P.
66. On or about February 19, 2019, Defendant denied the request under K.S.A. 45-221(a)(4). A copy of that email is attached hereto as Exhibit Q.
67. Also on or about February 1, 2019, Plaintiff submitted a request to Defendant, the City of Overland Park, Kansas, via email under the KORA stating, “If a pre-employment

psychological examination was made on Officer Clayton Jenison prior to his being hired, a copy of that document.” A copy of that email is attached hereto as Exhibit P.

68. On or about February 19, 2019, Defendant denied the request under K.S.A. 45-221(a)(4). A copy of that email is attached hereto as Exhibit Q.

February 4, 2019 KORA request to the City of Overland Park, Kansas

69. On or about February 4, 2019, Plaintiff submitted a request to Defendant, the City of Overland Park, Kansas, via email under the KORA for “The table of contents, index, or any such similar list of any and all items, materials, videos. Recordings, event reconstructions, reports, or the like, contained in the original investigative file of the Johnson County Multi-Jurisdictional Officer Involved Shooting Investigation Team Protocol and Procedure Manual, following its investigation of the officer involved shooting of John Albers on January 20, 2018.” A copy of that email is attached hereto as Exhibit R.
70. On or about February 19, 2019, Defendant denied the request under K.S.A. 45-221(a)(10). A copy of that email is attached hereto as Exhibit S.
71. Also on or about February 1, 2019, Plaintiff submitted a request to Defendant, the City of Overland Park, Kansas, via email under the KORA for “The roster of those members of the Johnson County Multi-Jurisdictional Officer Involved Shooting Investigation Team participating in the investigation of the officer involved shooting of John Albers on January 20, 2018, contained in the original investigative file of the Johnson County Multi-Jurisdictional Officer Involved Shooting Investigation Team, delivered to the Overland Park Police Department pursuant to the Johnson County Multi-Jurisdictional

Officer Involved Shooting Investigation Team Protocol and Procedure Manual.” A copy of that email is attached hereto as Exhibit R.

72. On or about February 19, 2019, Defendant denied the request under K.S.A. 45-221(a)(10). A copy of that email is attached hereto as Exhibit S.

February 1, 2019 KORA request to District Attorney Stephen M. Howe

73. On or about February 1, 2019, Plaintiff submitted a request to Defendant, Stephen M. Howe, District Attorney of Johnson County Kansas, via email under the KORA for “any and all 3DLaser Scans in the possession, custody or control, of the Johnson County District Attorney’s Office, taken at the scene of and following the officer involved shooting occurring on January 20, 2018 where John Albers was killed.” A copy of that email is attached hereto as Exhibit T.
74. On or about February 8, 2019, Defendant denied the request under K.S.A. 45-221(a)(10)(A) and (E). A copy of that email is attached hereto as Exhibit U.
75. On or about February 1, 2019, Plaintiff submitted a request to Defendant, Stephen M. Howe, District Attorney of Johnson County Kansas, via email under the KORA for “any and all forensic reconstructions of the officer involved shooting occurring on January 20, 2018 where John Albers was killed, in the possession, custody or control of the Johnson County District Attorney’s Office.” A copy of that email is attached hereto as Exhibit T.
76. On or about February 8, 2019, Defendant denied the request under K.S.A. 45-221(a)(10)(A) and (E). A copy of that email is attached hereto as Exhibit U.
77. On or about February 1, 2019, Plaintiff submitted a request to Defendant, Stephen M. Howe, District Attorney of Johnson County Kansas, via email under the KORA for “any

and all video materials made available to the Johnson County District Attorney in connection with the officer involved shooting occurring on January 20, 2018 where John Albers was killed.” A copy of that email is attached hereto as Exhibit T.

78. On or about February 8, 2019, Defendant denied the request under K.S.A. 45-221(a)(10)(A) and (E). A copy of that email is attached hereto as Exhibit U.

The Albers’ federal civil right lawsuit

79. On April 17, 2018, Sheila Albers, Administrator of the Estate of John Albers, filed a civil rights lawsuit against the City of Overland Park, Kansas and Clayton Jenison in the United States District Court for the District of Kansas. A copy of the Complaint is attached hereto as Exhibit V.
80. Said Complaint alleges the use of excessive force by Clayton Jenison against John Albers, resulting in violations of his rights under the 4th and 14th Amendments to the Constitution of the United States of America.
81. Said Complaint also alleges the use of improper policies, procedures, practices and customs by the Overland Park Police Department, resulting in violations of John Albers’ rights under the 4th and 14th Amendments to the Constitution of the United States of America.
82. On May 25, 2018, the defendants in the federal civil rights lawsuit filed their Answer and Motion for Judgment on the Pleadings. A copy of each is attached hereto as Exhibits W and X.
83. On October 26, 2018, Judge Daniel D. Crabtree issued his Memorandum and Order in the federal civil rights lawsuit. A copy of such Memorandum and Order is attached hereto as

Exhibit Y.

84. Therein, the Court granted Defendant's Motion for Judgment on the Pleadings regarding plaintiff's official capacity claim against Officer Jenison but, otherwise, denied defendants' motion, and allowed plaintiff's litigation to go forward.
85. In that opinion, the court concluded that from the totality of the circumstances alleged, plaintiff had stated a claim that Officer Jenison used lethal force unreasonably and that a reasonable jury might conclude: "That J.A. had committed no crime; that no officer stood in the path of the minivan; that J.A. had not threatened to hurt anyone but himself; and that J.A. was not fleeing from arrest because he did not know that a law enforcement officer was standing behind the van....In sum, a reasonable jury could conclude that Officer Jenison lacked probable cause to believe that J.A. posed a threat of serious physical harm to Officer Jenison or others." Exhibit Y, page 21.
86. On or about January 11, 2019, the defendants in the federal civil rights lawsuit agreed to pay the John Albers' estate \$2.3 million in exchange for dismissing the matter.

Events subsequent to the settlement of the civil lawsuit

87. On or about January 11, 2019, the Overland Park Police Department adopted amendments to its Standard Operating Procedure 2330, Response to Resistance. A copy thereof is attached hereto as Exhibit Z.
88. The amended policy included the following language: "Officers will not: Discharge a firearm at or from a moving vehicle except in self defense or defense of another and when the suspect is using deadly force by a means other than the vehicle unless: a reasonable officer could infer the vehicle is operated in a manner deliberately intended to

strike an officer or citizen and all other reasonable means of defense (including moving out of the path of the vehicle), have been exhausted, are not practical or are not present; and the safety of innocent persons would not be unduly jeopardized by the employee's action.”

89. The previous version of the Overland Park Police Department Standard Operating Procedure 2330 did not contain such language. A copy of the Overland Park Police Department Standard Operating Procedure 2330, effective March 23, 2018 is attached hereto as Exhibit AA.
90. The version of the Overland Park Police Department Standard Operating Procedure 2330 effective as of the date John Albers was killed did not contain such language. A copy of the Overland Park Police Department Standard Operating Procedure 2330, effective August 31, 2016 is attached hereto as Exhibit BB.
91. For a story that aired on February 13, 2019, the Chief of the Overland Park Police Department, Frank Donchez, gave an interview to Dhomonique Ricks, a reporter for Fox 4 Kansas City with regard to the John Albers killing. During that interview, Chief Donchez stated that Officer Jenison had followed department policy; that Officer Jenison had not been reprimanded; and that Officer Jenison had not been encouraged to leave the department. See *With questions and grief remaining, Overland Park family remembers son killed by police*. Fox 4 News, February 13, 2019, 6:11, 8:20; and 8:24. Retrieved from: <https://fox4kc.com/2019/02/13/with-questions-and-grief-remaining-overland-park-family-remembers-son-killed-by-police/>
92. For a story that aired on February 13, 2019, Defendant Stephen M. Howe, the District

Attorney of Johnson County, Kansas, gave an interview to Dhomonique Ricks, a reporter for Fox 4 Kansas City. During that interview, Defendant Howe was asked, “You mentioned social media. Talk here just a little bit on how you deal with the public’s response to whether there was excessive force and like that many shots when they’re hearing that...When you hear that and that’s been on TV, how do you balance that out?” See *With questions and grief remaining, Overland Park family remembers son killed by police*. Fox 4 News, February 13, 2019, 24:35. Retrieved from:

<https://fox4kc.com/2019/02/13/with-questions-and-grief-remaining-overland-park-family-remembers-son-killed-by-police/>

93. In response, Defendant Howe stated, “I think a lot of people should educate themselves before they jump to conclusions. That’s the one thing I hate about social media is people want to jump to conclusions without knowing the facts.” See *With questions and grief remaining, Overland Park family remembers son killed by police*. Fox 4 News, February 13, 2019, 24:50. Retrieved from: <https://fox4kc.com/2019/02/13/with-questions-and-grief-remaining-overland-park-family-remembers-son-killed-by-police/>

Applicable law

94. The KORA was passed by the legislature to insure public confidence in government by increasing the access of the public to government and its decision-making processes. This increases the accountability of governmental bodies and deters official misconduct. *Telegram Pub. Co., Inc. v. Kansas Dept. of Transp.*, Syl. 2, 275 Kan. 779 (2003); see also *Cypress Media, Inc. v. City of Overland Park*, 268 Kan. 407, 416 (2000).
95. “It is declared to be the public policy of the state that public records shall be open for

inspection by any person unless otherwise provided by this act, and this act shall be liberally construed and applied to promote such policy.” K.S.A. 45-216(a).

96. The KORA defines “public record” to mean “any recorded information, regardless of form, characteristics or location, which is made, maintained or kept by or is in the possession of any public agency.” K.S.A. 45-217(g)(1)(A).
97. The KORA provides that “[a]ll public records shall be open for inspection by any person, except as otherwise provided by this act.” K.S.A. 45-218(a).
98. The KORA further provides that a public agency “shall not be required to disclose...Records which are privileged under the rules of evidence, unless the holder of the privilege consents to the disclosure.” K.S.A. 45-221(a)(2).
99. The KORA further provides that a public agency “shall not be required to disclose... Medical, psychiatric, psychological or alcoholism or drug dependency treatment records which pertain to identifiable patients.” K.S.A. 45-221(a)(3).
100. The KORA further provides that a public agency “shall not be required to disclose... Personnel records, performance ratings or individually identifiable records pertaining to employees or applicants for employment, except that this exemption shall not apply to the names, positions, salaries or actual compensation employment contracts or employment-related contracts or agreements and lengths of service of officers and employees of public agencies once they are employed as such.” K.S.A. 45-221(a)(4).
101. The KORA further provides that a public agency “shall not be required to disclose...[c]orrespondence between a public agency and a private individual, other than correspondence which is intended to give notice of an action, policy or determination

relating to any regulatory, supervisory or enforcement responsibility of the public agency or which is widely distributed to the public by a public agency and is not specifically in response to communications from such a private individual. K.S.A. 45-221(a)(14).

102. The KORA further provides that a public agency “shall not be required to disclose... Public records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy.” K.S.A. 45-221(a)(30).
103. The KORA defines “[c]learly unwarranted invasion of personal privacy” in pertinent part to mean “revealing information that would be highly offensive to a reasonable person, including information that may pose a risk to a person or property and is not of legitimate concern to the public.” K.S.A. 45-217(b).
104. The KORA further provides that “a public agency shall not be required to disclose...criminal investigation records.” K.S.A. 45-221(a)(10).
105. The KORA defines “[c]riminal investigation records” in pertinent part to mean “records of an investigatory agency or criminal justice agency as defined by K.S.A. 22-4701, and amendments thereto, compiled in the process of preventing, detecting or investigating violations of criminal law.” K.S.A. 45-217(c)(2).
106. K.S.A. 45-221(a)(10) provides that this Court “may order disclosure of such records, subject to such conditions as the court may impose, if the court finds that disclosure: (A) Is in the public interest; (B) would not interfere with any prospective law enforcement action, criminal investigation or prosecution; (C) would not reveal the identity of any confidential source or undercover agent; (D) would not reveal confidential investigative

techniques or procedures not known to the general public; (E) would not endanger the life or physical safety of any person; and (F) would not reveal the name, address, phone number or any other information which specifically and individually identifies the victim of any sexual offense in article 35 of chapter 21 of the Kansas Statutes Annotated, prior to their repeal, or article 55 of chapter 21 of the Kansas Statutes Annotated, and amendments thereto.”

107. The term “in the public interest” is not defined or otherwise addressed in the KORA.
108. In an attempt to construe the law in *Harris Enterprises, Inc. v. Moore*, 241 Kan. 59, 65-66, HN. 4 (1987), the Kansas Supreme Court held “[t]he term ‘public interest’ as utilized in K.S.A. 45-221(a)(10)(A) means more than mere ‘public curiosity.’ To be a matter involving public interest, it must be one that affects a right or expectancy of the community at large and must derive meaning within the legislative purpose embodied in the statute.”
109. Under *Harris*, “[p]ublic interest existed in disclosure of murder investigation files where inconsistent statements were reported and definite disagreements arose between various law enforcement agencies.” Notes of Decisions, K.S.A. 45-221; see also *Harris Enterprises v. Moore*, 241 at 66 (“Where public officials thrust controversy concerning their official actions into the public spotlight and attention, this court must conclude that a definable public interest arises to investigate that controversy and to seek a resolution of it.”).
110. *Harris* also held that “the burden of establishing that disclosure of criminal investigation files is in the public interest is upon the person seeking disclosure.” *Harris*, 241 Kan., HN 3.

111. The KORA provides that “the burden of proof shall be on the public agency to sustain its action” in the event it denies the request. K.S.A. 45-222(c).
112. The KORA provides that “[t]he district court of any county in which public records are located shall have jurisdiction to enforce the purposes of this act with respect to such records, by injunction, mandamus, declaratory judgment or other appropriate order, in an action brought by any person.” K.S.A. 45-222(a).
113. The KORA further provides that “[i]n any action hereunder, the court shall award costs and a reasonable sum as an attorney’s fee for services rendered in such action, including proceedings on appeal, to be recovered and collected as part of the costs to the plaintiff if the court finds that the agency’s denial of access to the public record was not in good faith and without a reasonable basis in fact or law. The award shall be assessed against the public agency that the court determines to be responsible for the violation.” K.S.A. 45-222(d).
114. The KORA further provides that “proceedings arising under this section shall be assigned for hearing and trial at the earliest practicable date.” K.S.A. 45-222(g).

Count I
Declaratory Judgment Regarding the KORA Request to
Defendant Overland Park, Kansas of May 11, 2018

115. Plaintiff adopts and incorporates by reference herein, the allegations made and contained in paragraphs 1-114 of Plaintiff’s Petition herein.
116. Defendant Overland Park’s refusal to provide the documents requested in Plaintiff’s KORA request of May 11, 2018 gives rise to a genuine controversy between Plaintiff and the City of Overland Park, Kansas as to whether the requested records are “personnel records” pursuant to K.S.A. 45-221(a)(4).

117. Defendant's refusal to provide the requested records was not in good faith and was without a reasonable basis in law or in fact.

WHEREFORE, Plaintiff, Mark R. Schmid, requests the Court enter its judgment declaring that the requested documents in Plaintiff's KORA request of May 11, 2018 are not "personnel records" under K.S.A. 45-221(a)(4) and are, therefore, open public records and that the Court award Plaintiff his attorneys' fees and costs, together with such other and further relief as the Court deems just and proper under the circumstances herein.

Count II
Injunction Regarding the KORA Request to
Defendant Overland Park, Kansas of May 11, 2018

118. Plaintiff adopts and incorporates by reference herein, the allegations made and contained in paragraphs 1-117 of Plaintiff's Petition herein.

119. Because the records requested in Plaintiff's KORA request of May 11, 2018 are open public records, the Court should enter a mandatory injunction against the City of Overland Park, Kansas, ordering it to provide the requested records.

120. Defendant's refusal to provide the requested records was not in good faith and was without a reasonable basis in law or in fact.

WHEREFORE, Plaintiff Mark R. Schmid requests the Court order Defendant, the City of Overland Park, Kansas, to provide Plaintiff with the records requested in Plaintiff's KORA request of May 11, 2018 and that the Court award Plaintiff his attorneys' fees and costs, together with such further relief as the Court deems just and proper under the circumstances herein.

Count III
Declaratory Judgment Regarding the KORA Request to
Defendant Overland Park, Kansas of July 2, 2018

121. Plaintiff adopts and incorporates by reference herein, the allegations made and contained in paragraphs 1-120 of Plaintiff's Petition herein.
122. Defendant Overland Park's refusal to provide the documents requested in Plaintiff's KORA request of July 2, 2018 gives rise to a genuine controversy between Plaintiff and the City of Overland Park, Kansas as to whether the requested records are privileged under the rules of evidence pursuant to K.S.A. 45-221(a)(2); are medical, psychiatric, psychological or alcoholism or drug dependency treatment records which pertain to an identifiable patient, pursuant to K.S.A. 45-221(a)(3); personnel records pursuant to K.S.A. 45-221(a)(4); or public records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy, pursuant to K.S.A. 45-221(a)(30).
123. Defendant's refusal to provide the requested records was not in good faith and was without a reasonable basis in law or in fact.

WHEREFORE, Plaintiff, Mark R. Schmid, requests the Court enter its judgment declaring that the requested documents in Plaintiff's KORA request of July 2, 2018 are not privileged under the rules of evidence pursuant to K.S.A. 45-221(a)(2); are not medical, psychiatric, psychological or alcoholism or drug dependency treatment records which pertain to an identifiable patient, pursuant to K.S.A. 45-221(a)(3); are not personnel records pursuant to K.S.A. 45-221(a)(4); are not public records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy, pursuant to K.S.A. 45-221(a)(30) and are, therefore, open public records; and that the Court award Plaintiff his attorneys' fees and costs, together with such other and further relief as

the Court deems just and proper under the circumstances herein.

Count IV
Injunction Regarding the KORA Request to
Defendant Overland Park, Kansas of July 2, 2018

124. Plaintiff adopts and incorporates by reference herein, the allegations made and contained in paragraphs 1-123 of Plaintiff's Petition herein.
125. Because the records requested in Plaintiff's KORA request of July 2, 2018 are open public records, the Court should enter a mandatory injunction against the City of Overland Park, Kansas, ordering it to provide the requested records.
126. Defendant's refusal to provide the requested records was not in good faith and was without a reasonable basis in law or in fact.

WHEREFORE, Plaintiff Mark R. Schmid requests the Court order Defendant, the City of Overland Park, Kansas, to provide Plaintiff with the records requested in Plaintiffs KORA request of July 2, 2018 and that the Court award Plaintiff his attorneys' fees and costs, together with such further relief as the Court deems just and proper under the circumstances herein.

Count V
Declaratory Judgment Regarding the KORA Request to
Defendant Overland Park, Kansas of July 6, 2018

127. Plaintiff adopts and incorporates by reference herein, the allegations made and contained in paragraphs 1-126 of Plaintiff's Petition herein.
128. Defendant Overland Park's refusal to provide the documents requested in Plaintiff's KORA request of July 6, 2018 gives rise to a genuine controversy between Plaintiff and the City of Overland Park, Kansas as to whether the requested records are privileged under the rules of evidence pursuant to K.S.A. 45-221(a)(2); are medical, psychiatric,

psychological or alcoholism or drug dependency treatment records which pertain to an identifiable patient, pursuant to K.S.A. 45-221(a)(3); personnel records pursuant to K.S.A. 45-221(a)(4); are correspondence between a public agency and a private individual, other than correspondence which is intended to give notice of an action, policy or determination relating to any regulatory, supervisory or enforcement responsibility of the public agency or which is widely distributed to the public by a public agency and is not specifically in response to communications from such a private individual, pursuant to K.S.A. 45-221(a)(14), are public records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy, pursuant to K.S.A. 45-221(a)(30) or are criminal investigative records and that disclosure is not in the public interest; that disclosure would interfere with prospective law enforcement action, criminal investigation or prosecution; that disclosure would reveal the identity of any confidential source or undercover agent; that disclosure would reveal confidential investigative techniques or procedures not known to the general public; that disclosure would endanger the life or physical safety of any person; and that disclosure would reveal the name, address, phone number or any other information which specifically and individually identifies the victim of any sexual offense in article 35 of chapter 21 of the Kansas Statutes Annotated, prior to their repeal, or article 55 of chapter 21 of the Kansas Statutes Annotated, and amendments thereto, pursuant to K.S.A. 45-221(a)(10)(A)-(F).

129. Defendant's refusal to provide the requested records was not in good faith and was without a reasonable basis in law or in fact.

WHEREFORE, Plaintiff, Mark R. Schmid, requests the Court enter its judgment declaring that the requested documents in Plaintiff's KORA request of July 2, 2018 are not privileged under the rules of evidence pursuant to K.S.A. 45-221(a)(2); are not medical, psychiatric, psychological or alcoholism or drug dependency treatment records which pertain to an identifiable patient, pursuant to K.S.A. 45-221(a)(3); are not personnel records pursuant to K.S.A. 45-221(a)(4); are not public records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy, pursuant to K.S.A. 45-221(a)(30); are criminal investigative records but that disclosure is in the public interest; that disclosure would not interfere with prospective law enforcement action, criminal investigation or prosecution; that disclosure would not reveal the identity of any confidential source or undercover agent; that disclosure would not reveal confidential investigative techniques or procedures not known to the general public; that disclosure would not endanger the life or physical safety of any person; and that disclosure would not reveal the name, address, phone number or any other information which specifically and individually identifies the victim of any sexual offense in article 35 of chapter 21 of the Kansas Statutes Annotated, prior to their repeal, or article 55 of chapter 21 of the Kansas Statutes Annotated, and amendments thereto, pursuant to K.S.A. 45-221(a)(10) and are, therefore, open public records; and that the Court award Plaintiff his attorneys' fees and costs, together with such other and further relief as the Court deems just and proper under the circumstances herein.

Count VI
Injunction Regarding the KORA Request to
Defendant Overland Park, Kansas of July 6, 2018

130. Plaintiff adopts and incorporates by reference herein, the allegations made and

contained in paragraphs 1-129 of Plaintiff's Petition herein.

131. Because the records requested in Plaintiff's KORA request of July 2, 2018 are open public records, the Court should enter a mandatory injunction against the City of Overland Park, Kansas, ordering it to provide the requested records.
132. Defendant's refusal to provide the requested records was not in good faith and was without a reasonable basis in law or in fact.

WHEREFORE, Plaintiff Mark R. Schmid requests the Court order Defendant, the City of Overland Park, Kansas, to provide Plaintiff with the records requested in Plaintiff's KORA request of July 6, 2018 and that the Court award Plaintiff his attorneys' fees and costs, together with such further relief as the Court deems just and proper under the circumstances herein.

Count VII
Declaratory Judgment Regarding the KORA Request to
Defendant Overland Park, Kansas of February 1, 2019

133. Plaintiff adopts and incorporates by reference herein, the allegations made and contained in paragraphs 1-132 of Plaintiff's Petition herein.
134. Defendant Overland Park's refusal to provide the documents requested in Plaintiff's KORA request of February 1, 2019 gives rise to a genuine controversy between Plaintiff and the City of Overland Park, Kansas as to whether the requested records are criminal investigative records and that disclosure is not in the public interest; that disclosure would interfere with prospective law enforcement action, criminal investigation or prosecution; that disclosure would reveal the identity of any confidential source or undercover agent; that disclosure would reveal confidential investigative techniques or procedures not known to the general public; that disclosure would endanger the life or

physical safety of any person; and that disclosure would reveal the name, address, phone number or any other information which specifically and individually identifies the victim of any sexual offense in article 35 of chapter 21 of the Kansas Statutes Annotated, prior to their repeal, or article 55 of chapter 21 of the Kansas Statutes Annotated, and amendments thereto, pursuant to K.S.A. 45-221(a)(10)(A)-(F) and as to whether the requested records are personnel records pursuant to K.S.A. 45-221(a)(4).

WHEREFORE, Plaintiff, Mark R. Schmid, requests the Court enter its judgment declaring that the requested documents in Plaintiff's KORA request of February 1, 2019 are not personnel records pursuant to K.S.A. 45-221(a)(4); are criminal investigative records but that disclosure is in the public interest; that disclosure would not interfere with prospective law enforcement action, criminal investigation or prosecution; that disclosure would not reveal the identity of any confidential source or undercover agent; that disclosure would not reveal confidential investigative techniques or procedures not known to the general public; that disclosure would not endanger the life or physical safety of any person; and that disclosure would not reveal the name, address, phone number or any other information which specifically and individually identifies the victim of any sexual offense in article 35 of chapter 21 of the Kansas Statutes Annotated, prior to their repeal, or article 55 of chapter 21 of the Kansas Statutes Annotated, and amendments thereto, pursuant to K.S.A. 45-221(a)(10) and are, therefore, open public records; and that the Court award Plaintiff his attorneys' fees and costs, together with such other and further relief as the Court deems just and proper under the circumstances herein.

Count VIII
Injunction Regarding the KORA Request to
Defendant Overland Park, Kansas of February 1, 2019

135. Plaintiff adopts and incorporates by reference herein, the allegations made and contained in paragraphs 1-134 of Plaintiff's Petition herein.
136. Because the records requested in Plaintiff's KORA request of February 1, 2019 are open public records, the Court should enter a mandatory injunction against the City of Overland Park, Kansas, ordering it to provide the requested records.
137. Defendant's refusal to provide the requested records was not in good faith and was without a reasonable basis in law or in fact.

WHEREFORE, Plaintiff Mark R. Schmid requests the Court order Defendant, the City of Overland Park, Kansas, to provide Plaintiff with the records requested in Plaintiff's KORA request of February 1, 2019 and that the Court award Plaintiff his attorneys' fees and costs, together with such further relief as the Court deems just and proper under the circumstances herein.

Count IX
Declaratory Judgment Regarding the KORA Request to
Defendant Overland Park, Kansas of February 4, 2019

138. Plaintiff adopts and incorporates by reference herein, the allegations made and contained in paragraphs 1-137 of Plaintiff's Petition herein.
139. Defendant Overland Park's refusal to provide the documents requested in Plaintiff's KORA request of February 4, 2019 gives rise to a genuine controversy between Plaintiff and the City of Overland Park, Kansas as to whether the requested records are criminal investigative records and that disclosure is not in the public interest; that disclosure would interfere with prospective law enforcement action, criminal investigation or prosecution; that disclosure would reveal the identity of any confidential source or

undercover agent; that disclosure would reveal confidential investigative techniques or procedures not known to the general public; that disclosure would endanger the life or physical safety of any person; and that disclosure would reveal the name, address, phone number or any other information which specifically and individually identifies the victim of any sexual offense in article 35 of chapter 21 of the Kansas Statutes Annotated, prior to their repeal, or article 55 of chapter 21 of the Kansas Statutes Annotated, and amendments thereto, pursuant to K.S.A. 45-221(a)(10)(A)-(F). Additionally, defendant's denial gives rise to a genuine controversy between Plaintiff and the City of Overland Park, Kansas as to whether the requested records are personnel records pursuant to K.S.A. 45-221(a)(4).

WHEREFORE, Plaintiff, Mark R. Schmid, requests the Court enter its judgment declaring that the requested documents in Plaintiff's KORA request of February 4, 2019 are not personnel records pursuant to K.S.A. 45-221(a)(4); are criminal investigative records but that disclosure is in the public interest; that disclosure would not interfere with prospective law enforcement action, criminal investigation or prosecution; that disclosure would not reveal the identity of any confidential source or undercover agent; that disclosure would not reveal confidential investigative techniques or procedures not known to the general public; that disclosure would not endanger the life or physical safety of any person; and that disclosure would not reveal the name, address, phone number or any other information which specifically and individually identifies the victim of any sexual offense in article 35 of chapter 21 of the Kansas Statutes Annotated, prior to their repeal, or article 55 of chapter 21 of the Kansas Statutes Annotated, and amendments thereto, pursuant to K.S.A. 45-221(a)(10) and are, therefore, open

public records; and that the Court award Plaintiff his attorneys' fees and costs, together with such other and further relief as the Court deems just and proper under the circumstances herein.

Count X
Injunction Regarding the KORA Request to
Defendant Overland Park, Kansas of February 4, 2019

140. Plaintiff adopts and incorporates by reference herein, the allegations made and contained in paragraphs 1-139 of Plaintiff's Petition herein.
141. Because the records requested in Plaintiff's KORA request of February 4, 2019 are open public records, the Court should enter a mandatory injunction against the City of Overland Park, Kansas, ordering it to provide the requested records.
142. Defendant's refusal to provide the requested records was not in good faith and was without a reasonable basis in law or in fact.

WHEREFORE, Plaintiff Mark R. Schmid requests the Court order Defendant, the City of Overland Park, Kansas, to provide Plaintiff with the records requested in Plaintiffs KORA request of February 4, 2019 and that the Court award Plaintiff his attorneys' fees and costs, together with such further relief as the Court deems just and proper under the circumstances herein.

Count XI
Declaratory Judgment Regarding the KORA Request to
Defendant Stephen M. Howe, Johnson County District Attorney of February 1, 2019

143. Plaintiff adopts and incorporates by reference herein, the allegations made and contained in paragraphs 1-142 of Plaintiff's Petition herein.
144. Defendant Howe's refusal to provide the documents requested in Plaintiff's KORA request of February 4, 2019 gives rise to a genuine controversy between Plaintiff and the

District Attorney of Johnson County, Kansas as to whether the requested records are criminal investigative records and that disclosure is not in the public interest; and that disclosure would endanger the life or physical safety of any person; pursuant to K.S.A. 45-221(a)(10)(A) and (E).

WHEREFORE, Plaintiff, Mark R. Schmid, requests the Court enter its judgment declaring that the requested documents in Plaintiff's KORA request of February 1, 2019 are criminal investigative records but that disclosure is in the public interest and that disclosure would not endanger the life or physical safety of any person and that, pursuant to K.S.A. 45-221(a)(10) are, therefore, open public records; and that the Court award Plaintiff his attorneys' fees and costs, together with such other and further relief as the Court deems just and proper under the circumstances herein.

Count XII
Injunction Regarding the KORA Request to
Defendant Stephen M. Howe, Johnson County District Attorney of February 1, 2019

145. Plaintiff adopts and incorporates by reference herein, the allegations made and contained in paragraphs 1-144 of Plaintiff's Petition herein.
146. Because the records requested in Plaintiff's KORA request of February 1, 2019 are open public records, the Court should enter a mandatory injunction against the City of Overland Park, Kansas, ordering it to provide the requested records.
147. Defendant's refusal to provide the requested records was not in good faith and was without a reasonable basis in law or in fact.

WHEREFORE, Plaintiff Mark R. Schmid requests the Court order Defendant, Steve Howe, Johnson County District Attorney, to provide Plaintiff with the records requested in

Plaintiffs KORA request of February 1, 2019 and that the Court award Plaintiff his attorneys' fees and costs, together with such further relief as the Court deems just and proper under the circumstances herein.

Respectfully submitted,

/s/ Maxwell E. Kautsch

Kautsch Law, LLC
By Maxwell E. Kautsch #21255
810 Pennsylvania Street, Ste. 207
Lawrence, Kansas 66044
(785) 840-0077
fax (785) 842-3039
maxk@kautschlaw.com
Attorney for Plaintiff

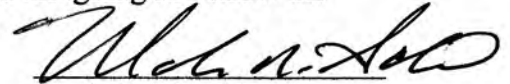
VERIFICATION

STATE OF KANSAS

)
) ss.
)

COUNTY OF JOHNSON

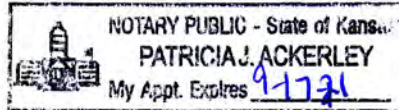
I, Mark R. Schmid, of lawful age, and after being first duly sworn on oath, state that I am the named Plaintiff in the above-styled action, that I have read the foregoing and know the contents thereof, and that all allegations of fact therein are true.


Mark R. Schmid

Subscribed and sworn to before me this 6th day of March, 2019.


Notary Public

My Appointment Expires:



Exhibits

Exhibit A	Media Release, January 20, 2018
Exhibit B	Media Fact Sheet-Press Conference, February 20, 2018
Exhibit C	Chief Donchez statement, February 20, 2018
Exhibit D	April 10, 2018, email from Defendant Overland Park, Kansas to <i>Kansas City Star</i>
Exhibit E	May 11, 2018, email from Plaintiff to Defendant Overland Park, Kansas
Exhibit F	May 17, 2018, letter from Defendant Overland Park, Kansas to Plaintiff
Exhibit G	May 17, 2018, email from Plaintiff to Defendant Overland Park, Kansas
Exhibit H	May 21, 2018, letter from Defendant Overland Park, Kansas to Plaintiff
Exhibit I	Correspondence between Plaintiff and Defendant Overland Park, Kansas
Exhibit J	July 31, 2018, email from Defendant Overland Park, Kansas to Plaintiff
Exhibit K	July 2, 2018, email from Plaintiff to Defendant Overland Park, Kansas
Exhibit L	July 20, 2018, email from Defendant Overland Park, Kansas to Plaintiff
Exhibit M	July 6, 2018, email from Plaintiff to Defendant Overland Park, Kansas
Exhibit N	July 25, 2018, email from Defendant Overland Park, Kansas to Plaintiff
Exhibit O	August 6, 2018, email from Defendant Overland Park, Kansas to Plaintiff
Exhibit P	February 1, 2019, email from Plaintiff to Defendant Overland Park, Kansas
Exhibit Q	February 19, 2019, email from Defendant Overland Park, Kansas to Plaintiff
Exhibit R	February 4, 2019, email from Plaintiff to Defendant Overland Park, Kansas
Exhibit S	February 19, 2019, email from Defendant Overland Park, Kansas to Plaintiff
Exhibit T	February 1, 2019, email from Plaintiff to Defendant Stephen M. Howe
Exhibit U	February 8, 2019, email from Defendant Stephen M. Howe to Plaintiff

Exhibit V	Complaint, <i>Albers v. City, et al.</i>
Exhibit W	Defendants’ Answer
Exhibit X.....	Defendants’ Motion for Judgment on the Pleadings
Exhibit Y	Memorandum and Order
Exhibit Z.....	Overland Park Police Department SOP 2330, effective January 11, 2019
Exhibit AA.....	Overland Park Police Department SOP 2330, effective March 23, 2018
Exhibit BB.....	Overland Park Police Department SOP 2330, effective August 31, 2016

Overland Park Police Department



Mark

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**Overland Park Police Department**

January 20 ·

IMMEDIATE RELEASE

January 20, 2018

Officer Involved Shooting

On January 20th, 2018 the Overland Park Police Department responded to the 9300 block of W.149th Terrace reference a welfare check of a suicidal male. As the responding officers approached the residence to make contact, the garage door opened and a vehicle exited the garage, moving rapidly toward one of the responding officers. The officer discharged his service weapon striking the male driver. The driver died at the scene.

The Johnson County Officer Involved Shooting Investigation Team (OISIT) in conducting the investigation. The officers were uninjured and the officer involved was placed on administrative leave pending the investigation. The deceased male name is not being released at this time. If you have any information or witnessed this incident you are asked to call the Overland Park Police Department at 913-895-6300 or the TIPS Hotline at 816-474-TIPS

End

Prepared by: John P. Lacy
Public Information Officer

108

38 Comments 23 Shares

Like

Comment

Share



Oldest

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**Jennifer Sands** Sending prayers for the deceased and to the officer involved.

Like · Reply · 47w

6

**Jenn Stuart** He was one of my daughter's friends and had been talking to her over the past week about what was bothering him. May his friends and family grieve and heal from this traumatic event.

Like · Reply · 47w

12

3 Replies

**Thomas McDonald** Glad the officers involved are alright.

Like · Reply · 47w

12

**Jessica Dalton** Where are the trained mental health officers OP has hired?!? Why is this Child dead? I don't know all the details but

37

**Community**

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29,660 people follow this

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MEDIA FACT SHEET- PRESS CONFERENCE

From: Steve Howe
(Olathe, KS)

Date: February 20, 2018

District Attorney Steve Howe announces that his office has completed a review of the January 20, 2018 shooting which led to the death of a young man in Overland Park, Kansas. It is the determination of the District Attorney that the Overland Park police officer's use of force was justified under Kansas law. Therefore, no criminal action will be taken against that officer.

SUMMARY OF FACTS AND FINDINGS

On Saturday, January 20, 2018, at around 5:35 p.m., Overland Park Police Dispatch began receiving 911 calls reporting a suicidal teen in their city. The callers named the teen and told 911 that he was broadcasting what appeared to be a suicide attempt on social media. He was at his home.

Emergency responders were sent to the location, a house in south Overland Park. Police and fire/EMS responded to the call, racing toward the neighborhood.

Dispatch continued to update the officers about the information they were receiving.

Two police officers arrived first, just moments apart. They walked up to the house. They talked briefly about hearing a dog barking inside. Dispatch had told them that "mom" was on the way. A woman had arrived at the scene and parked her vehicle behind a police car. The first officer believed this to be the teen's mother. He walked to her car and asked her if she had a phone number for the boy. This was a concerned adult friend, not the teen's mother.

The second officer remained near the house standing in the front yard.

Suddenly, the garage door to the house began opening. The second officer later told investigators that he thought that "mom" may have opened the door so that police could enter the house. The second officer walked up to the garage door.

There was a Honda Odyssey minivan in the garage. As the door opened, the minivan backed up, toward the second officer who was standing directly behind it. The officer drew his sidearm. He shouted “STOP THE CAR” in a booming voice that was picked up by another officer’s in-car recording system a block away. The van accelerated toward the officer. The officer shot twice while moving away from the van.

The van stopped. The officer lowered his pistol and began to radio dispatchers. The officer was on the grass to the side of the driveway, safely next to the van.

Suddenly, the van accelerated rapidly in reverse, down the driveway, into the street, and performed a maneuver that investigators later described as a “J” turn. The van, still in reverse, now facing the street, backed over the curb, onto the grass, toward the house, directly at the officer. In a split second, the officer went from a position of safety to once again being directly in the path of a van that was accelerating toward him.

The officer began shooting and moving as the van drove and turned.

The officer fired an additional eleven times. The van stopped, somehow got into neutral, and coasted down the driveway, across the street and into the neighbor’s yard.

Two other officers had arrived while this was going on. Those officers immediately went to the teen’s aid, but he was mortally wounded.

The officer who fired said “I thought he was going to run me over.”

The incident took approximately fourteen seconds.

None of the officers had an opportunity to talk with the teen.

Police officers, like all citizens, are allowed to defend themselves by using deadly force if they reasonably believe it is necessary to prevent death or great bodily harm to themselves or someone else.

In this case, police were called to this residence to perform what is known as “community caretaking.” They were there to stop a young man from committing suicide.

They never got that opportunity.

Right out of the garage, the teen drove the minivan directly toward the officer in an aggressive manner. The officer, who was in uniform, shouted “STOP THE CAR.” The van was equipped with an operable backup camera, which would have shown the officer behind the van when it backed out of the garage. Recovered social media video showed that the teen knew police were on the way to his house.

It was reasonable for the officer to conclude, as he did, that his life was at risk and it was necessary to fire two shots.

After the first two shots, the officer was on the grass in a position of safety relative to the van. The van had stopped. The officer felt safe enough to lower his weapon and begin to key the microphone on his chest.

At this point, for some unknown reason, the teen drove the vehicle in an extremely aggressive manner, accelerating and steering to where the van once again drove right at the officer, wheels spinning.

It was reasonable for the officer to conclude, as he did, that his life was again at risk and it was necessary to fire his weapon. He fired until the van stopped moving.

Case law instructs us that the standard to apply in these cases is one of “objective reasonableness.” Was it reasonable, given all the facts and circumstances, for the officer to use deadly force? Chief Justice Rehnquist wrote, in *Graham v. Connor*:

The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments- in circumstances that are tense, uncertain, and rapidly evolving - about the amount of force that is necessary in a particular situation.

This tragic situation was tense, uncertain and rapidly evolving. The officer had seconds to make a judgment. His judgment was not unreasonable.

Therefore, the officer will not face criminal charges for the shooting that happened on January 20, 2018.

Good morning.

First, I want to offer my sympathy, and the sympathy of the Police Department, to the Albers family, friends of John Albers, and the Blue Valley School District and community. This has been a tragic loss for our whole community.

As a department, we appreciate the professionalism and dedication of the District Attorney's office and the independent Officer-Involved Shooting Investigation Team. We fully cooperated and provided all requested information, which allowed OISIT to conduct a thorough and independent investigation and review.

Overland Park Police Department's professional standards unit conducted its own separate investigation regarding the officer-involved shooting. Moving forward, we will review the Department's use-of-force policy. It is my hope, the hope of all officers in our department, and all law enforcement agencies, to avoid similar situations.

THIS INFORMATION IS RESTRICTED AS IT IS SUBJECT TO DISSEMINATION.
CIVIL AND CRIMINAL PENALTIES MAY BE IMPOSED FOR MISUSE.
COMPLETENESS AND ACCURACY EXPRESSED BY EXHIBIT REQUESTER.
Copied to: Mark Stuchlik
KORA Request
11/9/2018 12:20 PM

email: "sean.reilly@opkansas.org Reilly, Sean" Tuesday, April 10, 2018 at 3:27:51 PM Central Daylight Time
 To: email: "icummings@kcstar.com Cummings, Ian"
 Cc: email: "jrobertson@kcstar.com Robertson, Joe", email: "john.lacy@opkansas.org Lacy, John", email: "frank.donchez@opkansas.org Frank Donchez", email: "tammmy.owens@opkansas.org Tammy Owens", email: "eric.blevins@opkansas.org Eric Blevins"

Ian, see the city's response to your questions -

- Can the department be more transparent on its findings in investigating the shooting of John Albers?

The criminal investigation was conducted by the Johnson County Officer Involved Shooting Team, not the OPPD. An internal review of whether or not policy was followed is still pending.

- What is the name of the officer who fired his weapon? Will his name be released?

As previously stated, the OPPD will not release the name of the officer, who has resigned from the department.

- Is the department reviewing its lethal force policy? What changes are being made or considered?

The Police Department is actively reviewing its use of force policy. Changes to the prohibited use of deadly force portion of the policy are being considered. In addition, our training regarding use of force are also being reviewed and changes are being considered.

- What is the policy for shooting into or from a moving vehicle? Has that policy changed?

The Policy states: "Officers will not:

- *Use deadly force to effect the arrest or prevent the escape of an unarmed, non-dangerous, fleeing felon.*
- *Discharge a firearm when it appears likely an innocent person may be injured, unless such discharge is immediately necessary to protect the officer or other person from imminent death or great bodily harm.*
- *Discharge a firearm at or from a moving vehicle except in self defense or defense of another and when the suspect is using deadly force."*

As previously stated, Overland Park is evaluating the current use of force policy.

Thanks

sean



M Schmid <markschmid5@gmail.com>

Kansas Open Records Act Request

M Schmid <markschmid5@gmail.com>
To: cityclerk@opkansas.org

Fri, May 11, 2018 at 12:44 PM

May 11, 2018

Ms. Elizabeth Kelley
City Clerk of Overland Park, Kansas
8500 Santa Fe Drive
Overland Park, KS 66212
Via email: cityclerk@opkansas.org

Re: Kansas Open Records Act Request

Dear Ms. Kelley:

I am writing to request an opportunity to inspect or obtain copies of the following public records pursuant to the Kansas Open Records Act, K.S.A. 45-215 et seq.:

1. The "Long Form" Response to Resistance Administrative Investigative Report prepared in connection with the use of deadly force incident of January 20, 2018 involving Officer Clayton Jenison and John Albers pursuant to Overland Park Police Department Standard Operating Procedure No.: 2330, effective 8/31/16.
2. Any document communicated to the appropriate Division Commander expressing any policy concerns created by the response to resistance incident of January 20, 2018 involving Officer Clayton Jenison and John Albers pursuant to Overland Park Police Department Standard Operating Procedure No.: 2330, effective 8/31/16.
3. Any document reflecting the review of the response to resistance incident of January 20, 2018 involving Officer Clayton Jenison and John Albers by the member's Section Manager or shift Watch Commander pursuant to Overland Park Police Department Standard Operating Procedure No.: 2330, effective 8/31/16.
4. Any document reflecting a determination by the member's Section Manager or Watch Commander of whether the response to resistance incident of January 20, 2018 involving Officer Clayton Jenison and John Albers was in compliance with policy pursuant to Overland Park Police Department Standard Operating Procedure No.: 2330, effective 8/31/16.
5. Any document reflecting a recommendation of discipline arising out of the response to resistance incident of January 20, 2018 involving Officer Clayton Jenison and John Albers pursuant to Overland Park Police Department Standard Operating Procedure No.: 2330, effective 8/31/16.
6. Any document generated from a Board of Review convened as a result of the response to resistance incident of January 20, 2018 involving Officer Clayton Jenison and John Albers pursuant to Overland Park Police Department Standard Operating Procedure No.: 2330, effective 8/31/16.

43

If there are any fees for searching or copying these records, please let me know such cost. This information is not being sought for commercial purposes.

If access to the records requested will take longer than three days, please contact me with information about when I might expect copies or the ability to inspect the requested records.

If you deny any or all of this request, please cite each specific exemption you feel justifies the refusal to release the information and notify me of the appeal procedures available to me under the law. Thank you for your consideration of my request.

Mark R. Schmid
13021 Larsen
Overland Park, KS 66213
913-908-3642
markschmid5@gmail.com

OVERLAND PARK

K A N S A S

ABOVE AND BEYOND. BY DESIGN.

Police Department

W. Jack Sanders Justice Center
12400 Foster
Overland Park, Kansas 66213
913/895-6000 • Emergency 911
www.opkansas.org

May 17th 2018

Mark Schmid
Markschmid5@gmail.com

RE: Kansas Open Records Act Request Dated May 11th 2018

Mark Schmid,

The Overland Park Police Department is in receipt of your request dated May 11th 2018 you sent to City Clerk Elizabeth Kelley. I will respond to each request individually below.

1. The "Long Form" Response to Resistance Administrative Investigative Report prepared in connection with the use of deadly force incident of January 20, 2018 involving Officer Clayton Jenison and John Albers pursuant to Overland Park Police Department Standard Operating Procedure No.: 2330, effective 8/31/16.

Your open records request for this information is denied pursuant to K.S.A. 45-221 (a) (4).

2. Any document communicated to the appropriate Division Commander expressing any policy concerns created by the response to resistance incident of January 20, 2018 involving Officer Clayton Jenison and John Albers pursuant to Overland Park Police Department Standard Operating Procedure No.: 2330, effective 8/31/16.

Your open records request for this information is denied pursuant to K.S.A. 45-221 (a) (4).

3. Any document reflecting the review of the response to resistance incident of January 20, 2018 involving Officer Clayton Jenison and John Albers by the member's Section Manager or shift Watch Commander pursuant to Overland Park Police Department Standard Operating Procedure No.: 2330, effective 8/31/16.

Your open records request for this information is denied pursuant to K.S.A. 45-221 (a) (4).

4. Any document reflecting a determination by the member's Section Manager or Watch Commander of whether the response to resistance incident of January 20, 2018 involving Officer Clayton Jenison and John Albers was in compliance with policy pursuant to Overland Park Police Department Standard Operating Procedure No.: 2330, effective 8/31/16.

Page 2

Your open records request for this information is denied pursuant to K.S.A. 45-221 (a) (4).

5. Any document reflecting a recommendation of discipline arising out of the response to resistance incident of January 20, 2018 involving Officer Clayton Jenison and John Albers pursuant to Overland Park Police Department Standard Operating Procedure No.: 2330, effective 8/31/16.

We have no records responsive to this request.

6. Any document generated from a Board of Review convened as a result of the response to resistance incident of January 20, 2018 involving Officer Clayton Jenison and John Albers pursuant to Overland Park Police Department Standard Operating Procedure No.: 2330, effective 8/31/16.

Your open records request for this information is denied pursuant to K.S.A. 45-221 (a) (4).

Please see the Kansas Open Record Act, K.S.A. 45-215 et seq. for appeal procedures. If you have further questions, please contact me or Assistant City Attorney Eric Blevins at 913.895.6086.

Brandon Kohake
Records Supervisor
913.327.6849
brandon.kohake@opkansas.org



M Schmid <markschmid5@gmail.com>

Kansas Open Records Request from May 11th 2018

M Schmid <markschmid5@gmail.com>

Thu, May 17, 2018 at 1:25 PM

To: "Kohake, Brandon" <brandon.kohake@opkansas.org>, "Blevins, Eric" <eric.blevins@opkansas.org>

May 17, 2018

Mr. Brandon Kohake
Records Supervisor
Overland Park Police Department

Mr. Eric R. Blevins
Assistant City Attorney
Overland Park, Kansas

Re: Response to Kansas Open Records Act Request of May 11, 2018

Gentlemen,

I am writing to follow up on the email and attachment received this morning from Mr. Kohake regarding my KORA request of May 11, 2018.

Per the attached letter, you have denied requests 1-4 and 6 based on your interpretation of K.S.A. 45-221(a)(4). As for request 5, you have indicated you have records responsive to the request.

With regard to the denials based on K.S.A. 45-221(a)(4), I would ask that you clarify your responses as to whether it is your contention that the request seeks personnel records, performance ratings, or individually identifiable information.

To the extent that your denials are based on my use of the name, Clayton Jenison, or any other names, I have no issue with you redacting the same from the records and would remind you of your obligations under K.S.A. 45-221(d).

I look forward to your prompt response.

Very truly yours,

Mark Schmid

[Quoted text hidden]



M Schmid <markschmid5@gmail.com>

Correction to email of 5-17-18

M Schmid <markschmid5@gmail.com>

Thu, May 17, 2018 at 8:58 PM

To: "Kohake, Brandon" <brandon.kohake@opkansas.org>, "Blevins, Eric" <eric.blevins@opkansas.org>

Gentlemen,

The second sentence in paragraph 2 of my email to you of May 17, 2018 should read:

As for request 5, you have indicated you have no records responsive to the request.

Mark Schmid

OVERLAND PARK

K A N S A S

ABOVE AND BEYOND. BY DESIGN.

Police Department

W. Jack Sanders Justice Center
12400 Foster
Overland Park, Kansas 66213
913/895-6000 • Emergency 911
www.opkansas.org

May 21st 2018

Mark Schmid
Markschmid5@gmail.com

RE: Response to Questions Posed May 17th 2018

Mark Schmid,

You seek clarification to our responses “as to whether it is your contention that the request seeks personnel records, performance ratings, or individually identifiable information.” We are denying based on personnel records.

Redaction of the names of the officer from the documents would be of no value, as they are personnel records of one officer, and would be redacted in their entirety.

Please see the Kansas Open Record Act, K.S.A. 45-215 et seq. for appeal procedures. If you have further questions, please contact me or Assistant City Attorney Eric Blevins at 913.895.6086.

Brandon Kohake
Records Supervisor
913.327.6849
brandon.kohake@opkansas.org



M Schmid <markschmid5@gmail.com>

KORA Request

M Schmid <markschmid5@gmail.com>

Mon, May 21, 2018 at 10:46 AM

To: "Kohake, Brandon" <brandon.kohake@opkansas.org>, "Blevins, Eric" <eric.blevins@opkansas.org>

Bcc: overlandparkunite@gmail.com, Doug Westerhaus <dwesterhaus@gmail.com>

Dear Mr. Kohake,

Thank you for your email of this morning, clarifying your denial of my previous KORA request.

Now that the specific basis of your denial is known, I would ask that you provide me with the following in order to substantiate your position:

1. A blank Long Form Response to Resistance Administrative Investigative Report Form;
2. Any document you rely upon in support of your contention that the "Long Form" Response to Resistance Administrative Investigative Report regarding the response to resistance incident of January 20, 2018, became a personnel record of the officer completing it.
3. Any document you rely upon in support of your contention that documents communicated to the appropriate Division Commander expressing any policy concerns created by the response to resistance incident of January 20, 2018, became a personnel record of the officer completing it.
4. Any document you rely upon in support of your contention that documents reflecting the review of the response to resistance incident of January 20, 2018 by the member's Section Manager or shift Watch Commander, became a personnel record of the officer involved in the response to resistance incident.
5. Any document you rely upon in support of your contention that documents reflecting a determination by the member's Section Manager or Watch Commander of whether the response to resistance incident of January 20, 2018, was in compliance with policy pursuant to Overland Park Police Department Standard Operating Procedure No.: 2330, effective 8/31/16, became a personnel record of the officer involved in the response to resistance incident.
6. Any document you rely upon in support of your contention that documents generated from a Board of Review convened as a result of the response to resistance incident of January 20, 2018, pursuant to Overland Park Police Department Standard Operating Procedure No.: 2330, effective 8/31/16, became a personnel record of the officer involved in the response to resistance incident.

I look forward to your response.

Mark Schmid
913-908-3642



M Schmid <markschmid5@gmail.com>

KORA Request

Kohake, Brandon <brandon.kohake@opkansas.org>
To: M Schmid <markschmid5@gmail.com>
Cc: "Blevins, Eric" <eric.blevins@opkansas.org>

Mon, May 21, 2018 at 3:22 PM

Mr. Schmid,

Please see the attached PDF labeled Long Form RTR. It is responsive to request number one.

Please see the attached PDF labeled AG Opinion 91-127 for the document responsive to requests two through six.

Thank you.

Brandon Kohake #918

Records Supervisor
Police Department

City of Overland Park
12400 Foster
Overland Park, KS 66213

(w) 913-327-6849 | (f) 913-890-1849
brandon.kohake@opkansas.org | www.opkansas.org



[Quoted text hidden]

2 attachments

AG Opinion 91-127.pdf
48K

Long Form RTR.pdf
18K



M Schmid <markschmid5@gmail.com>

KORA Request**M Schmid** <markschmid5@gmail.com>

Tue, May 22, 2018 at 6:13 AM

To: "Kohake, Brandon" <brandon.kohake@opkansas.org>, "Blevins, Eric" <eric.blevins@opkansas.org>

Dear Mr. Kohake,

Following my KORA request of May 11, 2018, you responded on May 17, 2018 by denying requests 1-4 and 6 on the ground that the exemption provided in K.S.A. 45-221(a)(4) applied.

I sought clarification of that denial in a follow up email of May 17, 2018 and you responded on May 21, 2018 that your denial was specifically based on the "personnel records" exception contained in K.S.A. 45-221(a)(4).

Following that May 21, 2018 email, I replied and requested any documents upon which you rely that indicate the records sought in the original requests 1-4 and 6 were in fact "personnel records."

You were kind enough to respond quickly yesterday afternoon and forwarded a copy of Kansas Attorney General Opinion 91-127.

Based on this response, it is clear that there are no specific Overland Park Police Department records indicating that the documents I have requested are to be classified or considered "personnel records" and made part of an officer's personnel file.

Further, the Attorney General Opinion you rely upon in no way provides specific support for your contention that the records I am seeking are "personnel records." In fact, Attorney General Stephan was unable to provide an opinion regarding the records sought and simply restated the availability of the exception if the requested documents were "personnel records."

"We have not been provided sufficient information to determine whether the records in question are personnel records, but if they are, K.S.A. 1990 Supp. 45-221(a)(4), as amended, permits discretionary closure by the record custodian unless some other law specifically negates such exercise of discretion." *Kansas Attorney General Opinion 91-127 at pages 3-4.*

I would also remind you of the recent decision of Johnson County District Court Judge Hauber in the case of *Scripps Media, Inc. v. The City of Merriam, Kansas, 16CV05238*. In granting Scripps Media summary judgment, Judge Hauber confirmed that simply saying something is a personnel record or including it in an employee's personnel file, doesn't make it a "personnel record."

Finally, the continuing denial to produce the records requested without a reasonable basis in law or fact, is evidence of a lack of good faith. In the event litigation is necessary, I will seek an award of attorney fees pursuant to K.S.A. 45-222(d).

I look forward to your response.

Mark Schmid



M Schmid <markschmid5@gmail.com>

KORA Request

M Schmid <markschmid5@gmail.com>

Wed, May 23, 2018 at 11:27 AM

To: "Blevins, Eric" <eric.blevins@opkansas.org>

Cc: "Kohake, Brandon" <brandon.kohake@opkansas.org>

Dear Mr. Blevins,

I am writing in a final attempt to resolve our differences regarding my KORA request of May 11, 2018.

If there were legitimate competing interests here regarding a good faith interpretation of a statutory exemption, I could understand your ongoing denial. Here, however, based on the complete lack of a substantive response attempting to validate the Department's refusal to produce the records, I believe you know that the records in question are not "personnel records."

I suspect that as in your response of May 8, 2018, when I initially sought your assistance simply to obtain answers to questions submitted to Public Information Officer John Lacey, "outside counsel" has directed you and Mr. Kohake to deny my KORA requests simply because of the pending Albers litigation. This is clearly inappropriate.

In the absence of a good faith dispute and where the denial is without a reasonable basis in fact or law, attorney fees are to be awarded.

Will outside counsel forgo billing the City for his fees to defend an action necessitated by this ridiculous denial? Will he be indemnifying the City for the attorney fees awarded as a result this bad faith denial without reasonable basis in law or fact? Will he be the one hung out to dry when the media is made aware of this clear violation of the Kansas Open Records Act? I suspect not.

Eric, this is not going to go away quietly. Overland Park does not need another black eye for its lack of transparency regarding the Albers matter. As a citizen of Overland Park, I urge you to advise the powers that be that denial of my request is the wrong action to take.

Mark Schmid



M Schmid <markschmid5@gmail.com>

KORA Request

Blevins, Eric <eric.blevins@opkansas.org>
To: M Schmid <markschmid5@gmail.com>

Thu, May 24, 2018 at 10:24 AM

Mr. Schmid -

In response to your email of yesterday, May 23, 2018, I have asked others in the Law Department to review the records as well. It is our collective opinion that these are, in fact, personnel records. We believe that the results of an internal investigation into the actions of OPPD personnel to determine if OPPD personnel policies were followed; amounts to a personnel record. The City's interpretation of the statutory provisions are in good faith and have a reasonable basis in fact and law. As I have no reason to believe that your interpretation of the statutory exemption is not in good faith - it appears we have a good faith disagreement and have reached an impasse on this matter. Therefore, please direct any further communications regarding this matter to Mike Seck at Fisher, Patterson, Sayler and Smith, his email address is mseck@fisherpatterson.com and his telephone number is 913.339.6757.

Thank you,

Eric R. Blevins

Assistant City Attorney II, Public Safety
Law

City of Overland Park
8500 Santa Fe Drive
Overland Park, KS 66212

(w) 913-895-6086 | (f) 913-895-5095
eric.blevins@opkansas.org | www.opkansas.org



[Quoted text hidden]



M Schmid <markschmid5@gmail.com>

KORA Request of May 11, 2018

M Schmid <markschmid5@gmail.com>
To: Mike Seck <mseck@fisherpatterson.com>

Mon, Jun 11, 2018 at 7:45 AM

Dear Mr. Seck,

I am writing at the direction of Eric Blevins following the City of Overland Park's refusal to produce documents pursuant to my Kansas Open Records Act request of May 11, 2018.

Mr. Blevins has denied my requests on the ground that the records requested are exempt from disclosure based on the "personnel record" exception set forth in K.S.A. 45-221 (a)(4). Unfortunately, other than the bald assertion that the records are personnel records and the citation of a Kansas Attorney General's opinion that supports my position, Overland Park and Mr. Blevins offer nothing in support of their position.

As the burden is ultimately upon the City to prove that an exception to disclosure applies, I thought that I would follow up with you to see what you've got.

Although I can find no Kansas appellate decisions, there are two Kansas District Court decisions that are directly on point in support of disclosure.

In the Johnson County case of *Scripps Media, Inc. et al. vs. The City of Merriam, Kansas*, 16CV05228, Judge Hauber held that video tapes of a city worker stealing gasoline were not "personnel records" and that the exemption of K.S.A. 45-221 (a)(4) did not apply.

Two points from the Judge's decision are important. First, the videos were not in the nature of what would be thought of as a personnel record. Second, just because a record is placed in an employee's personnel file doesn't make it a personnel record.

Equally significant is the decision of Judge Larry Hendricks, in the Shawnee County District Court case of *The Topeka Capital Journal v. City of Topeka Police Department*, 2010CV001362. There, Judge Hendricks held that Defensive Action Reports sought by the Topeka Capital Journal were not personnel records and the personnel record exemption of K.S.A. 45-221 (a)(4) did not apply. The Defensive Action Report sought from the Topeka Police Department is the same report that I am seeking under a different name, the Response to Resistance Report.

Other jurisdictions are also in accord. See *Thomas v. Hall*, 399 S.W. 3d 387 (Ark. 2012). There, the Arkansas Supreme Court held that Use of Force Reports prepared by a police officer in connection with force used in conducting an arrest were not employee-evaluation or job performance records and not exempt to disclosure under the Arkansas Freedom of Information Act.

Unless there is something I'm missing, it's clear the documents sought are not in the nature of what is thought to be a personnel record and simply asserting that they are is insufficient to meet your burden of proof.

Mr. Seck, I fully understand you can continue to deny disclosure and force this matter to suit. The question I have is why would you do that? There really isn't a good faith argument that the records sought are "personnel records" and an ongoing denial is simply going to further the belief that the City of Overland Park and its Police Department are not committed to transparency.

11/8/2018

Gmail - KORA Request of May 11, 2018

Please take a look at the cases I've cited, see what you think and let me know how we're going to proceed.

Very truly yours,

Mark Schmid
913-908-3642



M Schmid <markschmid5@gmail.com>

KORA Request of May 11, 2018

Mike Seck <mseck@fisherpatterson.com>
To: M Schmid <markschmid5@gmail.com>
Cc: Mike Seck <mseck@fisherpatterson.com>

Wed, Jun 20, 2018 at 7:04 AM

Mr. Schmid: I am in receipt of your voicemail from yesterday. I have been in trial the last two weeks and am in the process of digging out. I have not had an opportunity to address your e-mail below with the City but will attempt to do so this week. Thanks

From: M Schmid <markschmid5@gmail.com>
Sent: Monday, June 11, 2018 7:46 AM
To: Mike Seck <mseck@fisherpatterson.com>
Subject: KORA Request of May 11, 2018

Dear Mr. Seck,

[Quoted text hidden]



M Schmid <markschmid5@gmail.com>

KORA Request of May 11, 2018

Mike Seck <mseck@fisherpatterson.com>
To: M Schmid <markschmid5@gmail.com>
Cc: Mike Seck <mseck@fisherpatterson.com>

Tue, Jun 26, 2018 at 7:55 AM

Mr. Schmid: I am revisiting this e-mail and the string of e-mails between you and the City. I have conducted independent research and I agree that there are no appellate decisions that provide guidance. I will review the two cases you rely on but I have no immediate access to them. If you have them please forward them today and I will take a look at them and discuss their application with the City. Again, sorry for the delay but other immediate deadlines have had to be addressed.

From: M Schmid <markschmid5@gmail.com>
Sent: Monday, June 11, 2018 7:46 AM
To: Mike Seck <mseck@fisherpatterson.com>
Subject: KORA Request of May 11, 2018

Dear Mr. Seck,

[Quoted text hidden]



M Schmid <markschmid5@gmail.com>

KORA Request of May 11, 2018

Mark Schmid <markschmid5@gmail.com>
To: Mike Seck <mseck@fisherpatterson.com>

Tue, Jun 26, 2018 at 9:32 AM

Thanks for your note. I'm out today but will get them to you tomorrow.

Sent from my iPhone
[Quoted text hidden]



M Schmid <markschmid5@gmail.com>

KORA Request of May 11, 2018

M Schmid <markschmid5@gmail.com>
To: Mike Seck <mseck@fisherpatterson.com>

Wed, Jun 27, 2018 at 2:27 PM

Dear Mr. Seck,

I am attaching copies of the District Court decisions entered in the cases of *Scripps Media, Inc., d/b/a KSHB-41 v. The City of Merriam, Kansas* and *The Topeka Capital-Journal v. The City of Topeka Kansas Police Department*.

Also attached *Thomas v. Hall*, 399 S.W.3d 387 (2012), an Arkansas Supreme Court case finding that the police department use of force reports at issue were not employee-evaluation or job performance records and were subject to disclosure.

Please take a look at these and let me know what you think.

Mark Schmid

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3 attachments

-  **KORA Thomas v Hall Arkansas Use of Force Reports.pdf**
437K
-  **KORA.Scripps Media v City of Merriam.pdf**
8495K
-  **KORA.The Topeka Capital Journal v City of Topeka PD.pdf**
7652K



M Schmid <markschmid5@gmail.com>

KORA Request of May 11, 2018

Mike Seck <mseck@fisherpatterson.com>
To: M Schmid <markschmid5@gmail.com>
Cc: Mike Seck <mseck@fisherpatterson.com>

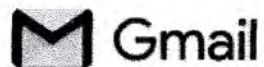
Thu, Jun 28, 2018 at 8:58 AM

Thanks. I will review and visit with the city and get back to you as soon as possible

From: M Schmid <markschmid5@gmail.com>
Sent: Wednesday, June 27, 2018 2:27 PM

[Quoted text hidden]

[Quoted text hidden]



M Schmid <markschmid5@gmail.com>

KORA Request of May 11, 2018

M Schmid <markschmid5@gmail.com>
To: Mike Seck <mseck@fisherpatterson.com>

Fri, Jul 6, 2018 at 9:45 AM

Mr. Seck, I am awaiting your response.

Mark Schmid
[Quoted text hidden]



M Schmid <markschmid5@gmail.com>

KORA Request of May 11, 2018

Mike Seck <mseck@fisherpatterson.com>

Fri, Jul 6, 2018 at 9:50 AM

To: M Schmid <markschmid5@gmail.com>

Cc: Mike Seck <mseck@fisherpatterson.com>, "Blevins, Eric" <eric.blevins@opkansas.org>

Mr. Schmid as I indicated to you I have been buried in trial preparation and trial the last two months and have other matters that I am trying to catch up on. I have briefly read your case law support and will try to evaluate your request for the city over the weekend. The people that are the decision makers are on vacation this week.

From: M Schmid <markschmid5@gmail.com>**Sent:** Friday, July 6, 2018 9:45 AM

[Quoted text hidden]

[Quoted text hidden]



M Schmid <markschmid5@gmail.com>

KORA Request

M Schmid <markschmid5@gmail.com>

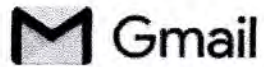
Mon, Jul 23, 2018 at 12:40 PM

To: Mike Seck <mseck@fisherpatterson.com>

Dear Mr. Seck,

Just writing to check on where I am in your queue.

Mark Schmid



M Schmid <markschmid5@gmail.com>

KORA Request

Mike Seck <mseck@fisherpatterson.com>
To: M Schmid <markschmid5@gmail.com>
Cc: Mike Seck <mseck@fisherpatterson.com>

Mon, Jul 23, 2018 at 12:43 PM

Have received no directive from the City. Will let you know when they give me my marching orders.

From: M Schmid <markschmid5@gmail.com>
Sent: Monday, July 23, 2018 12:41 PM
To: Mike Seck <mseck@fisherpatterson.com>
Subject: KORA Request

Dear Mr. Seck,

Just writing to check on where I am in your queue.

Mark Schmid



M Schmid <markschmid5@gmail.com>

KORA Request

M Schmid <markschmid5@gmail.com>
To: Mike Seck <mseck@fisherpatterson.com>

Mon, Jul 23, 2018 at 1:31 PM

Thank you.

[Quoted text hidden]



M Schmid <markschmid5@gmail.com>

KORA Request

Mike Seck <mseck@fisherpatterson.com>

Tue, Jul 31, 2018 at 9:39 AM

To: M Schmid <markschmid5@gmail.com>

Cc: Mike Seck <mseck@fisherpatterson.com>, Misty Renk <mrenk@fisherpatterson.com>

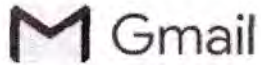
Mark: Thanks for visiting with me yesterday. The City stands by its denial. Thanks

From: M Schmid <markschmid5@gmail.com>**Sent:** Monday, July 23, 2018 12:41 PM**To:** Mike Seck <mseck@fisherpatterson.com>**Subject:** KORA Request

Dear Mr. Seck,

Just writing to check on where I am in your queue.

Mark Schmid



M Schmid <markschmid5@gmail.com>

KORA Request**M Schmid** <markschmid5@gmail.com>

Mon, Jul 2, 2018 at 10:12 AM

To: cityclerk@opkansas.org

July 2, 2018

Ms. Elizabeth Kelley
City Clerk of Overland Park, Kansas
8500 Santa Fe Drive
Overland Park, KS 66212

Via email: cityclerk@opkansas.org

Re: Kansas Open Records Act Request

Dear Ms. Kelley:

I am writing to request an opportunity to inspect or obtain copies of the following public records pursuant to the Kansas Open Records Act, K.S.A. 45-215 et seq.:

1. Record documenting what annual, biennial and triennial re-training programs as set forth in Standard Operating Procedure No.: 1290 were held and when they were held, from January 1, 2016 through January 1, 2017.
2. Pursuant to Standard Operating Procedure No.: 1290 II. C. approved lesson plans for all annual, biennial and triennial re-training programs held from January 1, 2016 through January 20, 2018.
3. Any employment related contract between Clayton Jennison and the City of Overland Park, Kansas and/or the City of Overland Park Police Department, regarding his resignation from employment as an officer of the Overland Park Police Department effective March 4, 2018.
4. Record documenting the person/persons responsible within the Overland Park Police Department for reviewing its Standard Operating Procedures and Policies to determine if revision is necessary.
5. Record documenting the person/persons responsible within the Overland Park Police Department for drafting revisions to its Standard Operating Procedures and Policies.
6. Record documenting the person/persons responsible within the Overland Park Police Department for approving revisions to its Standard Operating Procedures and Policies.
7. All emails between Chief Frank Donchez and District Attorney Steve Howe between January 20, 2018 and February 20, 2018 regarding the resignation of Officer Clayton Jennison from the Overland Park Police Department in lieu of prosecution.
8. Any letter of representation received by the Overland Park Police Department between January 20, 2018 and February 20, 2018, indicating that Officer Clayton Jennison was represented by an attorney.

If there are any fees for searching or copying these records, please let me know such cost. This information is not being sought for commercial purposes.

If access to the records requested will take longer than three days, please contact me with information about when I might expect copies or the ability to inspect the requested records.

If you deny any part or all of this request, please cite each specific exemption you feel justifies the refusal to release the information and notify me of the appeal procedures available to me under the law. Thank you for your consideration of my request.

Mark R. Schmid
13021 Larsen
Overland Park, KS 66213
913-908-3642
markschmid5@gmail.com



M Schmid <markschmid5@gmail.com>

Response to July 2nd 2018 KORA Request

Kohake, Brandon <brandon.kohake@opkansas.org>
To: M Schmid <markschmid5@gmail.com>

Fri, Jul 20, 2018 at 1:19 PM

Mr. Schmid,

Please see below in response to your request you emailed to City Clerk Elizabeth Kelley on July 2nd 2018.

Please see the attachment labeled 'training,' it is responsive to request number one and number two.

On request number three, for the resignation agreement between Officer Jennison and the city is denied in its entirety under K.S.A. 45-221(a) (4). In addition several portions of the agreement are also exempt from disclosure under K.S.A. 45-221 (a) (30), K.S.A. 45-221 (a) (2) (see *Mason v. Stock*, 869 F. Supp. 828), and K.S.A. 45-221 (a) (3).

Requests four, five, six, and eight, we have no records responsive to the requests.

Please see the attachment labeled 'chiefs emails,' it is responsive to request number seven.

Brandon Kohake #918

Records Supervisor
Police Department

City of Overland Park
12400 Foster
Overland Park, KS 66213

(w) 913-327-6849 | (f) 913-890-1849
brandon.kohake@opkansas.org | www.opkansas.org



2 attachments

Chiefs Emails.pdf
344K

Training.pdf
12286K



M Schmid <markschmid5@gmail.com>

KORA Request

M Schmid <markschmid5@gmail.com>
To: cityclerk@opkansas.org

Fri, Jul 6, 2018 at 10:36 AM

July 6, 2018

Ms. Elizabeth Kelley
City Clerk of Overland Park, Kansas
8500 Santa Fe Drive
Overland Park, KS 66212

Via email: cityclerk@opkansas.org

Re: Kansas Open Records Act Request

Dear Ms. Kelley:

I am writing to request an opportunity to inspect or obtain copies of the following public records pursuant to the Kansas Open Records Act, K.S.A. 45-215 et seq.:

1. The document, memorandum, or the like, setting forth the "...established Department procedures...." for conducting the administrative investigation of officer involved shootings pursuant to Overland Park Police Department SOP 1180, II. L, effective date 12-2-16.
2. The document, memorandum, or the like, setting forth Chief Frank Donchez' directive pursuant to Overland Park Police Department SOP 1180, II. L, effective date 12-2-16, to initiate an administrative investigation into the officer involved shooting of January 20, 2018.
3. The document, memorandum, or the like, setting forth the findings of the administrative investigation of the officer involved shooting of January 20, 2018.
4. The document, memorandum, or the like, reflecting Chief Frank Donchez' decision regarding the final disposition of the officer involved shooting of January 20, 2018, pursuant to Overland Park Police Department SOP 1180, II. L, effective date 12-2-16.
5. The document, memorandum, or the like, reflecting Chief Frank Donchez' decision regarding the amount of time Officer Clayton Jennison could spend on administrative leave pursuant to Overland Park Police Department SOP 1180, II. L, effective date 12-2-16.
6. A copy of the original case file provided to the Overland Park Police Department by the Johnson County Officer Involved Shooting Investigation Team, pursuant to it's protocol and procedures with regard to the officer involved shooting of January 20, 2018.

If there are any fees for searching or copying these records, please let me know such cost. This information is not being sought for commercial purposes.

If access to the records requested will take longer than three days, please contact me with information about when I might expect copies or the ability to inspect the requested records.

8/7/2018

Gmail - KORA Request

If you deny any part or all of this request, please cite each specific exemption you feel justifies the refusal to release the information and notify me of the appeal procedures available to me under the law. Thank you for your consideration of my request.

Mark R. Schmid
13021 Larsen
Overland Park, KS 66213
913-908-3642
markschmid5@gmail.com



M Schmid <markschmid5@gmail.com>

Response to July 6th 2018 KORA Request

Kohake, Brandon <brandon.kohake@opkansas.org>

Wed, Jul 25, 2018 at 2:02 PM

To: M Schmid <markschmid5@gmail.com>

Mr. Schmid,

Please see below in response to your request you emailed to City Clerk Elizabeth Kelley on July 6th 2018.

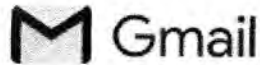
In response to requests one and two, we have no records responsive to the request.

On request number three, the entire document is denied in its entirety under K.S.A. 45-221 (a) (4).

In response to requests four and five, we have no records responsive to the request.

On request number 6, we will continue to investigate this request. You should hear back from us no later than August 24th 2018.

Brandon Kohake #918Records Supervisor
Police DepartmentCity of Overland Park
12400 Foster
Overland Park, KS 66213(w) 913-327-6849 | (f) 913-890-1849
brandon.kohake@opkansas.org | www.opkansas.org**OVERLAND PARK**
K A N S A S
BOLD AND BEYOND. BY DESIGN



M Schmid <markschmid5@gmail.com>

July 6th, 2018 KORA Request

Blevins, Eric <eric.blevins@opkansas.org>
To: M Schmid <markschmid5@gmail.com>

Mon, Aug 6, 2018 at 11:32 AM

Mr. Schmid,

In reference to your Kansas Open Records Request from July 6th, 2018 whereby you requested "A copy of the original case file provided to the Overland Park Police Department by the Johnson County Officer Involved Shooting Investigation Team, pursuant to it's protocol and procedures with regard to the officer involved shooting of January 20, 2018."

This request is denied in its entirety as the Johnson County Officer Involved Shooting Investigation Team report is a criminal investigation record pursuant to 45-221(a)(10). The entire purpose in forming the Johnson County Officer Involved Shooting Investigation Team is to investigate officer involved shootings for the purpose of presenting the case and evidence to the Johnson County District Attorney's office to determine if criminal charges should be filed. It is the very definition of a criminal investigation.

Although we are denying your request in its entirety based upon our analysis of K.S.A. 45-221(a)(10); it's also our analysis that portions of the report would also be closed under K.S.A. 45-221(a)(3), K.S.A. 45-221(a)(10)(F), K.S.A. 45-221(a)(14), and K.S.A. 45-221(a)(30).

In addition, the Albers action is subject to an Order staying discovery in Federal Court Case No. 2:18-cv-02185-DDC-JPO Albers v. Overland Park, Kansas, and counsel for the City has been informed that you are a friend of the Albers family and it appears you are providing the Albers or their attorney with documents obtained from the City under these KORA requests. Therefore, your request for the OISIT report is also denied under K.S.A 45-221(a)(2).

In response to your e-mail from July 22nd, 2018 to Brandon Kohake concerning your KORA request from July 2, 2018 where you requested the separation agreement between the City of Overland Park and Officer Jennison; while we appreciate your analysis, we stand by our opinion that this document is closed as a personnel record under KORA. Again, this request is denied pursuant to K.S.A. 45-221(a)(4). It's also our analysis that portions of the agreement would also be closed under K.S.A. 45-221(a)(3) and K.S.A. 45-221(a)(30).

As you are aware, the Kansas Open Records Act has sections detailing appealing our decisions to the district court.

I apologize for the delay in getting our response to you, as I know you have contacted Brandon seeking an explanation for the delay. Given the volume and sensitive nature of the OISIT report, we wanted to a thorough review of your request and the associated material.

Thank you.

Eric R. Blevins

Assistant City Attorney II, Public Safety
Law

City of Overland Park
8500 Santa Fe Drive
Overland Park, KS 66212

(w) 913-895-6086 | (f) 913-895-5095
eric.blevins@opkansas.org | www.opkansas.org



CONFIDENTIAL - ATTORNEY - CLIENT STATEMENT This message is from the City Attorney's Office and may contain information which is privileged and confidential and is solely for the use of the intended recipient. If you are not the intended recipient, be aware that any review, disclosure, copying, distribution, or use of the contents of this message is strictly prohibited. If you have received this in error, please destroy it immediately and please notify me immediately by return electronic mail or by telephone at 913-895-6083. If the heading of this message is "Confidential Attorney-Client Privileged Information," such message shouldn't be sent to distribution lists, be forwarded to anyone else, or be retained on the network e-mail system. If a copy of a privileged message needs to be retained, it should be printed and filed in an appropriate file.



M Schmid <markschmid5@gmail.com>

KORA Request**M Schmid** <markschmid5@gmail.com>

Fri, Feb 1, 2019 at 2:17 PM

To: cityclerk@opkansas.org

Bcc: Max Kautsch <maxk@kautschlaw.com>

February 1, 2019

Ms. Elizabeth Kelley
City Clerk of Overland Park, Kansas
8500 Santa Fe Drive
Overland Park, KS 66212
Via email: cityclerk@opkansas.org

Re: Kansas Open Records Act Request

Dear Ms. Kelley:

I am writing to request an opportunity to inspect or obtain copies of the following public records pursuant to the Kansas Open Records Act, K.S.A. 45-215 et seq.:

1. The dashboard camera video from Unit 240 taken on January 20, 2018 in connection with its response to being dispatched to 9309 W. 149th Terrace, Overland Park, Kansas.
2. The dashboard camera video from Unit 237 taken on January 20, 2018 in connection with its response to being dispatched to 9309 W. 149th Terrace, Overland Park, Kansas.
3. The dashboard camera video from Unit 234 taken on January 20, 2018 in connection with its response to being dispatched to 9309 W. 149th Terrace, Overland Park, Kansas.
4. Any press release issued by the Overland Park Police Department in connection with the settlement of the Federal civil rights lawsuit brought by Sheila Albers against the City of Overland Park, Kansas and Clayton Jenison on or about January 14, 2019.
5. Any press release issued by the City of Overland Park, Kansas in connection with the settlement of the Federal civil rights lawsuit brought by Sheila Albers against the City of Overland Park, Kansas and Clayton Jenison on or about January 14, 2019.
6. Any document maintained by the Overland Park Police Department indicating that Officer Clayton Jenison was issued a replacement gun as well as when and where that took place following the officer involved shooting of John Albers.
7. Any document reflecting that pursuant to Overland Park Police Standard Operating Procedure 1180, Officer Clayton Jenison qualified on any newly issued gun following the shooting of John Albers.
8. Any document maintained by the Overland⁷⁶ Park Police Department reflecting whether Officer Clayton Jenison was placed on administrative leave or administrative duty following the shooting of

John Albers.

9. If Officer Clayton Jenison was placed on administrative leave following the shooting of John Albers, any document maintained by the Overland Park Police Department reflecting who, pursuant to Overland Park Police Standard Operating Procedure 1180, was assigned to check on Officer Jenison's welfare daily and identify any needed assistance or resources.
10. Any document maintained by the Overland Park Police Department reflecting that a Critical Incident Stress Debriefing was held involving the officers involved in the shooting incident of John Albers.
11. Any document maintained by the Overland Park Police Department indicating that Chief Frank Donchez, or his designee, would require Officer Clayton Jenison to pass a fit for duty evaluation by the department's psychologist before returning to duty.
12. Any document maintained by the Overland Park Police Department indicating that Officer Clayton Jenison took a fit for duty evaluation by the department's psychologist following the officer involved shooting of John Albers on January 20, 2018.
13. Overland Park Police Standard Operating Procedure 2330 as of February 1, 2019.
14. Any documents maintained by the Overland Park Police Department reflecting any changes in training as a result of the officer involved shooting of John Albers on January 20, 2018.
15. Any document maintained by the Overland Park Police Department indicating that a background check was made on Officer Clayton Jenison prior to his being hired by the Overland Park Police Department.
16. If a background check was made on Officer Clayton Jenison prior to his being hired, a copy of that document.
17. Any document maintained by the Overland Park Police Department indicating that a pre-employment psychological examination was made of Officer Clayton Jenison prior to his being hired by the Overland Park Police Department.
18. If a pre-employment psychological examination was made of Officer Clayton Jenison prior to his being hired, a copy of that document.
19. Any document maintained by the City of Overland Park, Kansas and/or Overland Park Police Department, evidencing the filing of a Kansas Workers' Compensation Claim by Officer Clayton Jenison arising out of the shooting of John Albers on January 20, 2018.
20. Any document maintained by the City of Overland Park, Kansas and/or Overland Park Police Department, evidencing a settlement of any workers' compensation claim by Clayton Jenison arising out of the shooting of John Albers on January 20, 2018.
21. Any document maintained by the City of Overland Park, Kansas and/or Overland Park Police Department, evidencing payments made to Officer Clayton Jenison with regard to any workers' compensation claim made by Officer Jenison arising out of the shooting of John Albers on January 20, 2018.

If there are any fees for searching or copying these records, please let me know such cost. This information is not being sought for commercial purposes.

If access to the records requested will take longer than three days, please contact me with information about when I might expect copies or the ability to inspect the requested records.

If you deny any or all of this request, please cite each specific exemption you feel justifies the refusal to release the information and notify me of the appeal procedures available to me under the law. Thank you for your consideration of my request.

Mark R. Schmid
13021 Larsen
Overland Park, KS 66213
913-908-3642
markschmid5@gmail.com



M Schmid <markschmid5@gmail.com>

Response to Request February 1st 2019 2:17 PM

Kohake, Brandon <brandon.kohake@opkansas.org>
To: M Schmid <markschmid5@gmail.com>

Tue, Feb 19, 2019 at 10:41 AM

Mr. Schmid,

Please see below in response to your request that was emailed to City Clerk Elizabeth Kelley on February 1st 2019 at 2:17 pm.

On request one, two and three, all are denied pursuant to K.S.A. 45-221 (a) (10).

I am providing you with the two videos that the Johnson County District Attorney's office released. They are provided to you on a Blu-ray disc, free of charge.

On request number four, we have no records responsive to your request.

On request number five, we have no records responsive to your request.

On request number six, we have no records responsive to your request.

On request number seven, we have no records responsive to your request.

On request number eight, included is a document titled personnel action request. It is responsive to this request.

On request number nine, we have no records responsive to your request.

On request number ten, included is an email titled CISM Debrief. It is responsive to this request.

On request number eleven, we have no records responsive to your request.

On request number twelve, we have no records responsive to your request.

On request number thirteen, included is SOP 2330. It is thirteen pages in length.

On request number fourteen, we have no records responsive to your request.

On request number fifteen, it is denied pursuant to K.S.A. 45-221 (a) (4).

On request number sixteen, it is denied pursuant to K.S.A. 45-221 (a) (4).

On request number seventeen, it is denied pursuant to K.S.A. 45-221 (a) (4).

On request number eighteen, it is denied pursuant to K.S.A. 45-221 (a) (4).

On request number nineteen, we have no records responsive to your request.

On request number twenty, we have no records responsive to your request.

On request number twenty one, we have no records responsive to your request.

There is a total of 15 pages for a cost of \$3.75. The records are available at the front window at the Sanders Justice Center, 12400 Foster, 8:00 am to 4:30 pm.

Brandon Kohake #918

Records Supervisor

Police Department

City of Overland Park

12400 Foster

Overland Park, KS 66213

(w) 913-327-6849 | (f) 913-890-1849

brandon.kohake@opkansas.org | www.opkansas.org

OVERLAND PARK

KANSAS
ABOVE AND BEYOND. BY DESIGN.



M Schmid <markschmid5@gmail.com>

KORA Request

M Schmid <markschmid5@gmail.com>
To: cityclerk@opkansas.org
Bcc: Max Kautsch <maxk@kautschlaw.com>

Mon, Feb 4, 2019 at 12:05 PM

February 4, 2019

Ms. Elizabeth Kelley
City Clerk of Overland Park, Kansas
8500 Santa Fe Drive
Overland Park, KS 66212
Via email: cityclerk@opkansas.org

Re: Kansas Open Records Act Request

Dear Ms. Kelley:

I am writing to request an opportunity to inspect or obtain copies of the following public records pursuant to the Kansas Open Records Act, K.S.A. 45-215 et seq.:

1. The table of contents, index, or any such similar list of any and all items, materials, videos, recordings, event reconstructions, reports, or the like, contained in the original investigative file of the Johnson County Multi-Jurisdictional Officer Involved Shooting Investigation Team, delivered to the Overland Park Police Department pursuant to the Johnson County Multi-Jurisdictional Officer Involved Shooting Investigation Team Protocol and Procedure Manual, following its investigation of the officer involved shooting of John Albers on January 20, 2018.
2. The roster of those members of the Johnson County Multi-Jurisdictional Officer Involved Shooting Investigation Team participating in the investigation of the officer involved shooting of John Albers on January 20, 2018, contained in the original investigative file of the Johnson County Multi-Jurisdictional Officer Involved Shooting Investigation Team, delivered to the Overland Park Police Department pursuant to the Johnson County Multi-Jurisdictional Officer Involved Shooting Investigation Team Protocol and Procedure Manual.
3. A statement of the total man hours spent investigating the officer involved shooting of John Albers on January 20, 2018, contained in the original investigative file of the Johnson County Multi-Jurisdictional Officer Involved Shooting Investigation Team, delivered to the Overland Park Police Department pursuant to the Johnson County Multi-Jurisdictional Officer Involved Shooting Investigation Team Protocol and Procedure Manual.
4. Any billing statements submitted to the Overland Park Police Department from third parties brought in to assist in the investigation of the officer involved shooting of John Albers on January 20, 2018, by the Johnson County Multi-Jurisdictional Officer Involved Shooting Investigation Team.
5. Any oral or written correspondence received by Police Chief Frank Donchez from any member of the Johnson County Multi-Jurisdictional Officer Involved Shooting Investigation Team investigating the officer involved shooting of John Albers on January 20, 2018. This would include letters, notes, emails, voice mails messages and the like.

If there are any fees for searching or copying these records, please let me know such cost. This information is not being sought for commercial purposes.

If access to the records requested will take longer than three days, please contact me with information about when I might expect copies or the ability to inspect the requested records.

If you deny any or all of this request, please cite each specific exemption you feel justifies the refusal to release the information and notify me of the appeal procedures available to me under the law. Thank you for your consideration of my request.

Mark R. Schmid
13021 Larsen
Overland Park, KS 66213
913-908-3642
markschmid5@gmail.com



M Schmid <markschmid5@gmail.com>

Response to Request February 4th 2019 12:05 PM

Kohake, Brandon <brandon.kohake@opkansas.org>
To: M Schmid <markschmid5@gmail.com>

Tue, Feb 19, 2019 at 9:26 AM

Mr. Schimd,

Please see below in response to your request that was emailed to City Clerk Elizabeth Kelley on February 4th 2019 at 12:05 pm.

On request number one, it is denied pursuant to K.S.A. 45-221 (a) (10).

On request number two, it is denied pursuant to K.S.A. 45-221 (a) (10) and K.S.A. 45-221 (a) (4).

On request number three, the total hours was 624.9.

On request number four, we have no records responsive to your request.

On request number five, any oral communication between Chief Donchez and members of OISIT would not be subject to the Kansas Open Records Act, as for the remainder of request 5, we have no records responsive to your request.

Brandon Kohake #918

Records Supervisor
Police Department

City of Overland Park
12400 Foster
Overland Park, KS 66213

(w) 913-327-6849 | (f) 913-890-1849
brandon.kohake@opkansas.org | www.opkansas.org

OVERLAND PARK
K A N S A S
AROUND AND BEYOND. BY DESIGN.



M Schmid <markschmid5@gmail.com>

KORA Request**M Schmid** <markschmid5@gmail.com>

Fri, Feb 1, 2019 at 10:09 PM

To: "Bergeron, Kristi, DAT" <Kristi.Bergeron@jocogov.org>

February 1, 2019

Ms. Kristi Bergeron
Public Information Officer
Johnson County District Attorney's Office
P.O. Box 728
Olathe, KS 66061

Via email: Kristi.Bergeron@jocogov.org

Re: Kansas Open Records Act Request

Dear Ms. Bergeron:

I am writing to request an opportunity to inspect or obtain copies of the following public records pursuant to the Kansas Open Records Act, K.S.A. 45-215 et seq.:

1. Any and all 3D Laser Scans in the possession, custody or control, of the Johnson County District Attorney's Office, taken at the scene of and following the officer involved shooting occurring on January 20, 2018 where John Albers was killed.
2. Any and all forensic reconstructions of the officer involved shooting occurring on January 20, 2018 where John Albers was killed, in the possession, custody or control of the Johnson County District Attorney's Office.
3. Any and all video materials made available to the Johnson County District Attorney in connection with the officer involved shooting occurring on January 20, 2018 where John Albers was killed.
4. Any forensic engineering report in the possession, custody or control of the Johnson County District Attorney's Office made in connection with the officer involved shooting occurring on January 20, 2018 where John Albers was killed.

If there are any fees for searching or copying these records, please let me know such cost. This information is not being sought for commercial purposes.

If access to the records requested will take longer than three days, please contact me with information about when I might expect copies or the ability to inspect the requested records.

If you deny any or all of this request, please cite each specific exemption you feel justifies the refusal to release the information and notify me of the appeal procedures available to me under the law.

Thank you for your help and assistance.

Mark R. Schmid
13021 Larsen

2/20/2019

Gmail - KORA Request

Overland Park, KS 66213
913-908-3642
markschmid5@gmail.com

OFFICE OF DISTRICT ATTORNEY
STEPHEN M. HOWE, DISTRICT ATTORNEY

February 8, 2019

Mark R. Schmid
13021 Larsen
Overland Park, KS 66213
913-908-3642

Dear Mr. Schmid:

We have received your email dated January 29, 2019, requesting records pursuant to the Kansas Open Records Act regarding the January 20, 2018, incident that resulted in the death of John Albers.

On February 4, 2019, we asked for additional time to respond to your request.

The records you are requesting include:

1. The video clip of the Overland Park Police Department dashboard camera facing west, as played at the District Attorney's Press Conference of February 20, 2018.
2. The original of the Overland Park Police Department dashboard camera facing west referred to above prior to it being edited.
3. The video clip of the Overland Park Police Department dashboard camera facing east, as played at the District Attorney's Press Conference of February 20, 2018.
4. The original of the Overland Park Police Department dashboard camera facing east referred to above prior to it being edited.

We have reviewed your request and provide the following response:

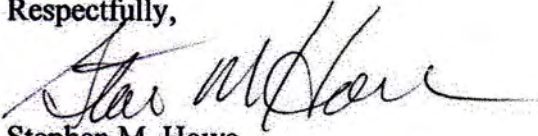
Requests 1 and 3.

The Johnson County District Attorney's Office does not have a copy of the redacted videos played during the press conference. Those videos are maintained at the Overland Park Police Department. After speaking with them, it is our understanding that these redacted videos have already been provided to you.

Requests 2, and 4.

Your request is denied. The requested records fall under the criminal records exception of the Kansas Open Records Act, pursuant to K.S.A. 45-221(a)(10)(A) and (E).

Respectfully,

A handwritten signature in black ink, appearing to read "Stephen M. Howe", written in a cursive style.

Stephen M. Howe
Johnson County District Attorney

EXHIBIT V

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
At Kansas City, Kansas**

SHEILA ALBERS as Administrator of the)
Estate of J.A., Deceased,)
)
Plaintiff,)
)
v.)
)
CLAYTON JENISON)
Serve Counsel at:)
Michael Seck)
Fisher Patterson Saylor & Smith, LLP)
9393 West 110th Street, Suite 300)
Building 51, Corporate Woods)
Overland Park, Kansas 66210)
)
And)
)
THE CITY OF OVERLAND PARK, KANSAS,)
Serve Counsel at:)
Michael Seck)
Fisher Patterson Saylor & Smith, LLP)
9393 West 110th Street, Suite 300)
Building 51, Corporate Woods)
Overland Park, Kansas 66210)
)
Defendants.)

PLAINTIFF'S COMPLAINT

Plaintiff, Shelia Albers as Administrator on behalf of the estate of decedent, J.A., states and alleges the following in support of the causes of actions against defendants Clayton Jenison and the City of Overland Park, Kansas.

PARTIES

1. Plaintiff, Shelia Albers, is the mother and duly appointed Administrator of the Estate of J.A., deceased, having been duly appointed by the Probate Division of Johnson County, Kansas in case no. 18PR00225.

2. Defendant Clayton Jenison (hereinafter referred to as “defendant Jenison”) was at all relevant times mentioned herein a duly sworn law enforcement officer for the City of Overland Park, Kansas Police Department and is being sued in his individual and official capacity. At all times mentioned herein, defendant Jenison was acting under the color of state law. At all times relevant defendant Jenison was acting within the course and scope of his employment with defendant City of Overland Park, Kansas and had final policy making authority concerning police activities. Additionally, defendant was responsible for the administration, implementation and authorization of police services.

3. Defendant City of Overland Park, Kansas is a municipality acting through its constituent, the Overland Park, Kansas Police Department (hereinafter referred to as “defendant O.P.P.D”). The O.P.P.D. is located in Johnson County, Kansas. Defendant O.P.P.D. had final policymaking authority regarding the Overland Park, Kansas Police Department and primary responsibility for the administration of activities and services of the Overland Park Police Department. In addition, the defendant O.P.P.D. is in charge of, a policymaker for, authorizes, and implements the policies, procedures, rules, regulations and guidelines of the Overland Park Police Department. At all relevant times defendant O.P.P.D. was the public employer of defendant Jenison.

VENUE AND JURISDICTION

4. Venue is proper in this Court pursuant to 28 U.S.C.A. § 1391(b) and (e) as the events and/or acts and/or omissions giving rise to this Complaint occurred in Johnson County, Kansas, which lies within the District of Kansas, and because defendants were performing their respective duties and responsibilities within the District of Kansas. Additionally, the parties reside, or, at the time the events took place, resided in this judicial district.

5. This Court has jurisdiction over plaintiff's federal constitutional claims pursuant to 42 U.S.C. § 1983, 28 U.S.C. §§ 1343, 1331, 1332 and the 4th and 14th Amendments to the Constitution of the United States. This Court also has jurisdiction pursuant to 42 U.S.C. §1988 to award and allocate attorney fees which are specifically requested in plaintiff's prayer for relief.

FACTS COMMON TO ALL COUNTS

6. At the time of the shooting described herein, J.A. was a 140 lb., seventeen (17) year-old boy enrolled as a junior at Blue Valley Northwest High School ("BVNW"). He maintained a 3.2 G.P.A. and recently scored a 25 on his ACT. He was also a member of the BVNW junior varsity soccer team. J.A. planned on attending college in the fall following his high school graduation in 2019.

7. J.A. was at home alone in the Albers' family residence located in Johnson County, Kansas early in the evening of January 20, 2018.

8. On the evening of January 20, 2018, defendants learned *via* law enforcement dispatch radio communication that J.A. was at home and threatening to harm himself with a knife. The officers, including defendant Jenison, were dispatched to the Albers' residence for the sole purpose of performing a welfare check on J.A.

9. Prior to January 20, 2018, defendants knew J.A. had potential mental health issues and history. However, prior to that evening, J.A. had never threatened suicide, attempted to commit suicide or threatened to harm himself.

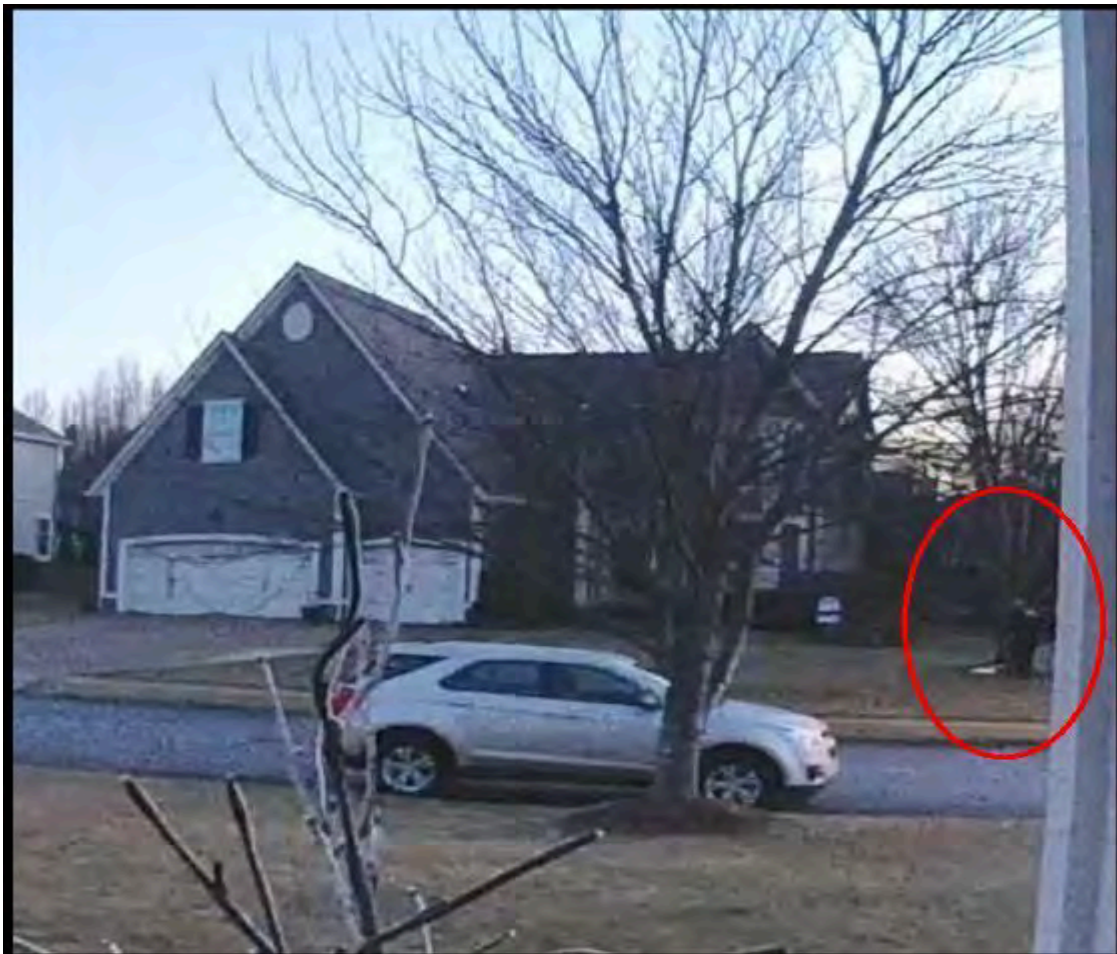
10. Prior to January 20, 2018, defendant Jenison did not receive Crisis Intervention Training (CIT), which teaches officers how to de-escalate and diffuse mental health situations when answering calls for service.

11. From the time of defendant O.P.P.D.'s initial arrival at the Albers' home until J.A. was killed, defendant O.P.P.D. did not have a CIT trained officer involved to help in their interaction with J.A. or to guide non-CIT trained defendant Jenison on how to properly handle the situation.

12. Defendants were subsequently dispatched to the Albers' residence armed with the information provided by the dispatcher. One first responding officer answered the radio dispatcher as they were in route, "I'm familiar with that kid."

13. Two O.P.P.D. vehicles arrived simultaneously at the Albers' residence. The first vehicle, driven by an unidentified Overland Park Police Officer, arrived and parked across the street approximately 30 yards to the east of the Albers' home. Defendant Jenison arrived in a separate patrol vehicle and parked around the corner on Hayes Street approximately 40-50 yards to the northwest of the Albers' residence.

14. After both vehicles parked, the officers exited and approached the Albers' residence. The two officers met and communicated for several minutes in the Albers' driveway before the unnamed officer returned to his patrol vehicle to retrieve his cellular telephone. Defendant Jenison remained positioned in a defensive stance behind a tree located in the Albers' front yard. The tree is located exactly 51 feet from the Albers' two car garage. *See the photograph below.*



15. At no point did either officer attempt to knock on the Albers' door or otherwise attempt to communicate with J.A. They never announced their presence at the residence as law enforcement officers. This is despite being on the Albers' property for several minutes. Their two parked O.P.P.D. patrol vehicles did not have lights or sirens activated and were out of the normal range of sight from occupants of the Albers' residence.

16. As the unidentified officer jogged to his patrol vehicle parked to the east of the residence to retrieve his cellular telephone, defendant Jenison left his defensive position behind the tree and walked towards the Albers' house.

17. As defendant Jenison walked toward the Albers' house, their two-car garage door began to rise. Defendant Jenison then un-holstered his service weapon (believed to be a 9 mm pistol) and continued walking toward the rising garage door. J.A.'s autopsy confirmed defendant

Jenison's weapon was loaded with "hollow point" bullets. These bullets are designed to increase in diameter and fragment once within the target, thus maximizing tissue damage, blood loss and shock.

18. There was absolutely no reasonable basis for defendant Jenison to un-holster his firearm at this time or any point in the interaction. The following photograph depicts defendant Jenison at the time he began to unholster his weapon.



19. Despite this being a welfare check, defendant Jennison did not attempt to speak to J.A. He failed to identify himself as a law enforcement officer. Prior to his death, J.A. did not communicate with the officers in any manner. He was not suspected for any crime and had committed no crime. An objectively reasonable officer would not have drawn his weapon and

continued to approach the family minivan under these circumstances. No other officers unholstered their weapons during the sequence until after defendant Jenison began shooting J.A.

20. As defendant Jenison continued to approach with his weapon drawn, he watched and listened for nine (9) seconds as the garage door slowly continued to rise.

21. During the nine (9) second timeframe, defendant Jenison heard the minivan's engine running and observed that the rear brake lights were activated. The following two photographs depict defendant Jenison's position as the garage door rose with the minivan's break lights on.





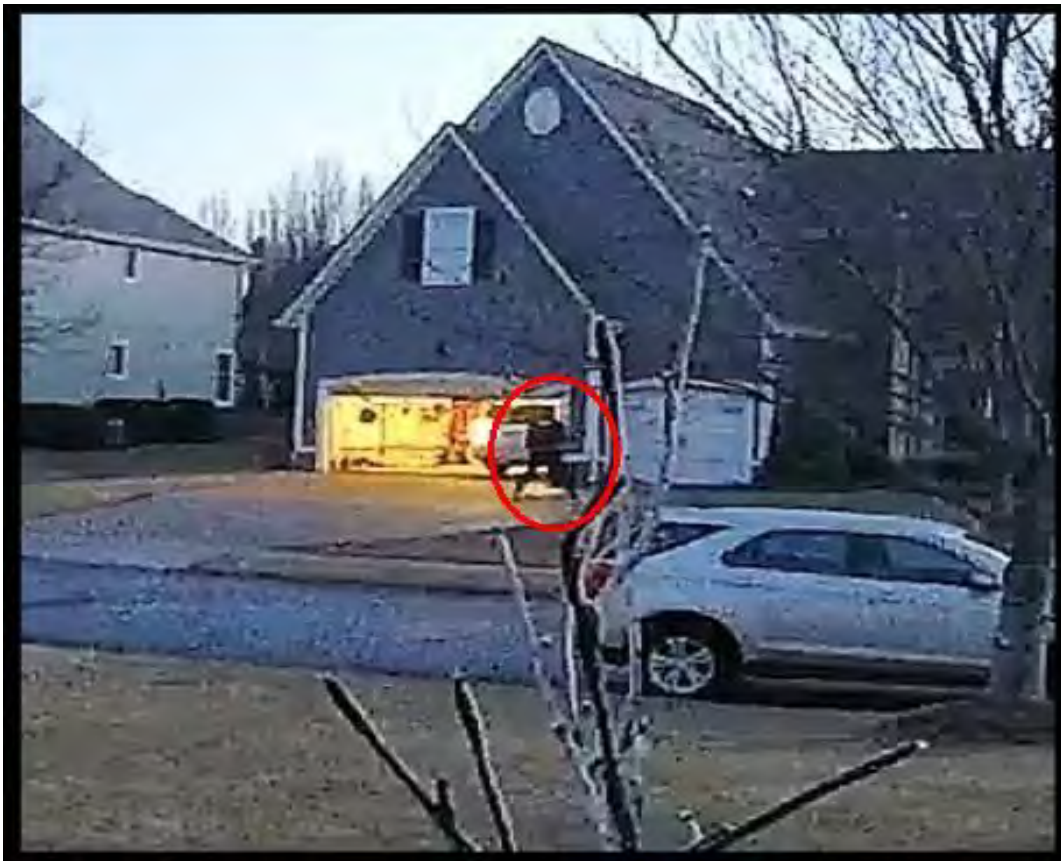
22. Shortly thereafter, in addition to the rear brake lights, the white reverse warning tail lights also lit up indicating the minivan was in reverse gear. The following two photographs depict defendant Jenison's position as the garage door rose with the minivan's reverse tail lights and brake lights on.



23. Defendant Jenison observed this sequence, which confirmed to him the minivan was in reverse gear and preparing to back up. The minivan then began to slowly back out of the garage. Defendant Jenison was neither in a confined space nor in the path of the minivan.

24. Despite knowing the minivan was going to back out of the garage, and then observing it begin to back out of the garage, defendant Jenison chose to recklessly move from his existing location directly toward the outer rear passenger corner of the moving minivan. All the while his weapon was un-holstered and pointed in the direction of the minivan. The following three photographs taken by a nearby Ring Doorbell show defendant Jenison moving toward the minivan as it slowly backed out of the garage.





25. Defendant Jenison's act of moving toward the reversing minivan with his gun pointed at the vehicle was contrary to O.P.P.D. policies and law enforcement standards regarding self-imposed jeopardy. There was no reason for him to move toward the minivan.

26. Defendant Jenison's actions of walking toward the moving vehicle with his gun un-holstered was also contrary to de-escalation techniques taught in the Crisis Intervention Training he never received.

27. There was no valid reason for him to have his weapon un-holstered and pointed toward the minivan. There was no valid reason for defendant Jenison to step closer to the minivan when it was clearly backing out of the garage. Moving away from the moving minivan would have been the much easier and safer undertaking. Defendant Jenison was in no danger.

28. J.A. backed the minivan from his garage in a straight line traveling at 2.5 M.P.H. Defendant Jenison, while choosing to move toward the outside rear passenger corner of the minivan quickly yelled, "stop, stop, stop" in short sequence. Less than (1) second later defendant Jenison fired his pistol two times at J.A. Defendant Jenison was not in the path of the slow-moving minivan when he fired the two shots. Defendant Jenison was not in a confined area and nothing prevented him from moving further away from the moving minivan. Defendant Jenison, the other officers, and the public in general were not in any danger.

29. The following two photographs depict defendant Jenison's position as he fired the first and second shots at J.A. Defendant Jenison was 5.9 feet away from the outer rear passenger corner of the minivan when he fired the first shot. He was 6.3 feet away from the outer rear passenger corner when he fired the second. The photographs confirm defendant Jenison was not in the direct path of the minivan. Rather, he was located a safe distance to the outside of the rear passenger quarter panel.

Shot One:



Shot two:



25. After the first shot was fired, the minivan's rear brake lights activated confirming J.A. had activated the brakes and was trying to stop the vehicle after hearing the shot. Despite J.A. complying with defendant Jenison's commands, defendant Jenison nonetheless fired the

second shot at J.A. The photograph above shows defendant Jenison's weapon barrel flash as he fired the second shot while the minivan's brake lights were illuminated.

26. One or both of the first two hollow point bullets fired by defendant Jenison struck J.A. rendering him incapacitated and completely unable to keep control of the minivan. The minivan's movements after the first two shots were caused by defendant Jenison, not J.A.

27. There is no indication J.A. knew defendant Jenison was present in his driveway or was a law enforcement officer until after he had been shot and seriously wounded.

28. Defendant Jenison was never in the direct path of the vehicle or in danger of being struck by the minivan at any time prior to firing the first two of his thirteen shots at J.A. Additionally, despite other viably safe options and not being in a confined area, defendant Jenison intentionally and unnecessarily continued to place himself near the outside rear passenger corner of the minivan as it reversed.

29. Defendant Jennison violated department policies and police safety standards by recklessly firing his weapon into a moving vehicle which he knew, or should have known, created a great risk that the vehicle would become out of control. Defendant Jenison knew, or should have known, firing into a moving vehicle and/or shooting the teenage driver of a moving vehicle created a potential hazard. A teenage driver operating a moving vehicle that has actually been shot, or simply being shot at multiple times, would likely lose control of the vehicle.

30. After defendant Jenison fired the first two shots, the minivan momentarily came to a complete stop in his driveway. It then continued to move in reverse making a U -Turn in the open driveway/yard area of the Albers' property. After the minivan completed the U-Turn, defendant Jenison was located standing safely on the passenger side of the vehicle.

31. The minivan continued to travel in reverse at 3.5 M.P.H. in a straight path directly toward the Albers' empty home. Defendant Jenison remained safely on the passenger side of the

minivan and out of its path as it slowly traveled past him and toward the home. There were no officers between the minivan and the Albers' residence as it traveled toward the Albers' home. No officers or civilians were ever in any danger.

32. As the minivan slowly traveled past defendant Jenison toward the home, defendant Jenison fired eleven (11) additional hollow point bullets at J.A. as illustrated by the images below capturing defendant Jenison's exact position as he fired each shot.

33. The following chart identifies defendant Jenison's distance from the closest point of the minivan as it traveled past him at less than 4 M.P.H. At all times Jenison was located safely to either the outer rear passenger corner of the minivan or directly on the passenger side. Jenison was never in its path.

Gunshot	Officer distance from van (ft)
1	5.9
2	6.3
3	3.6
4	4.2
5	5.5
6	7.0
7	8.6
8	10.3
9	12.0
10	13.6
11	15.3
12	17.0
13	18.9

Shot Three:



Shot Four:



Shot Five:



Shot Six:



Shot Seven:



Shot Eight:



Shot Nine:



Shot Ten:



Shot Eleven:



Shot Twelve:



Shot Thirteen:



34. Defendant Jenison fired the eleventh (15.3 feet away from the van), twelfth (17.0 feet away) and thirteenth (18.9 feet away) shots directly at J.A. as the minivan sat motionless.

35. After the shooting stopped, the minivan began to coast forward in neutral.

36. The minivan continued to coast across the street and eventually came to rest in a neighbor's front yard in neutral gear.

37. Defendant Jenison was never in the direct path of the vehicle, in a confined area, or in any danger prior to or while firing thirteen (13) shots directly at J.A. No officers or civilians were ever in any danger. Additionally, despite other viably safe options, defendant Jenison intentionally continued to place himself adjacent to the outer rear and passenger side portions of the slow-moving minivan.

38. Defendant Jenison approaching the minivan with his gun drawn was completely unnecessary.

39. Autopsy confirmed J.A. was shot six (6) times by defendant Jenison resulting in his death. The autopsy specifically found:

- 3/8-inch entrance wound in the right back of J.A.'s head, directly behind his right ear. The bullet traveled from right to left, back to front and upwards and exited from the left temporal scalp. This bullet fractured his skull and lacerated his brain.
- 1/2-inch entrance wound in the back of J.A.'s upper neck. The bullet traveled left to right and upwards entering the cranial cavity through his occipital bone. It caused laceration and fragmentation of the cerebellum. The bullet fragmented as designed. The bullet fragments exited the bone but stayed within the inner layer of the skin.
- 1/2 -inch bullet entrance wound is at the back of J.A.'s left shoulder. The bullet path traveled right to left and downwards. It exited from his chest.
- 1/4 – inch entrance hole to the right back torso. This hollow point bullet pieces fragmented and were located still under the skin in the left lateral anterior chest.
- A grazing gunshot wound approximately 1 ¾ x 1 inch located on the top right shoulder.
- A gunshot wound to his lower lip which exited the right side of his face. The wound is approximately 2 inches long.

40. Any single one of the six bullet wounds suffered by J.A. was debilitating rendering him permanently unable keep the minivan under control.

41. J.A. was not under the influence of drugs and/or alcohol. Autopsy results confirmed “the decedent was not intoxicated with drugs or toxins.” It further found a “small amount of ethanol (alcohol)” but not at an intoxicating level. The only substance found were therapeutic amounts of Adderall that J.A. had legally been taking as prescribed by his physician to treat his attention deficit hyperactivity disorder (ADHD).

42. The U.S. Department of Justice, the International Association of Chiefs of Police, and the Police Executive Research Forum have long supported policies against shooting at moving vehicles unless there is a threat other than that posed by the vehicle itself.

43. The O.P.P.D.'s policy on shooting at moving vehicles states officers will not shoot at a moving vehicle "except in self-defense or defense of another and when the suspect is using deadly force." J.A. never used or threatened to use deadly force at any point. At no point was it reported that J.A. was armed while in the minivan. He never possessed a firearm of any kind.

44. Further, O.P.P.D.'s policy regarding Discharging Firearms states "Because firing at or from a moving vehicle adversely affects accuracy...if the driver of the subject vehicle is disabled, the vehicle may be left without an able driver, firing at a suspect vehicle is prohibited except when in the direction of the officer it is used as a last resort when reasonably necessary to prevent serious injury to or death of the officer or innocent persons." No officers or civilians were ever in any danger. There were numerous viable and safe options available to defendant Jenison other than killing J.A.

45. A vehicle passing a police officer does not give that officer an ongoing license to kill an unthreatening citizen. At no point prior to the thirteen (13) shots fired by defendant Jenison had J.A. threatened to harm the officers. There had been absolutely no communication between J.A. and the O.P.P.D. officers. It was never alleged or reported J.A. was armed with any type of weapon while he was inside the minivan. J.A. never waved or otherwise displayed the knife to officers. J.A. never attempted to roll his window down or exit the minivan. J.A. never left his own driveway. He was not under the influence of drugs or alcohol. He was not wanted for any crimes. He committed no crime. There was no probable cause to believe that J.A. was a threat of serious physical harm to the officers or to others.

46. Upon information and belief, defendant Jenison fired directly at J.A. until his gun ran out of ammunition. It is believed defendant Jenison's pistol had a twelve (12) round clip capacity and carried an additional round in the gun's chamber bringing the weapon's bullet capacity to thirteen (13).

47. J.A.' actions never posed a threat to defendant Jenison or the safety of any police officers. Defendant Jenison was not in danger at any point during the moments he took J.A.'s life. Defendant Jenison was not in danger of being harmed by the minivan because he was standing at a safe distance to the outer rear and passenger side of the vehicle as it slowly moved past him.

48. Defendant Jenison did not have the need to have his gun un-holstered and pointed at J.A. at any point during this entire incident. No other officers un-holstered their weapons until after defendant Jenison began unnecessarily shooting J.A.

49. Despite other officers being on the scene while these events unfolded, none fired their weapon.

50. Despite crime scene investigators' searches, various bullets fired by defendant Jenison were never accounted for or found. Verifying stray 9mm hollow point bullets impacted other targets in the densely populated neighborhood.

51. Defendant Jennison violated known department policies and gun safety standards by recklessly firing his weapon in a densely populated neighborhood when others, including O.P.P.D. officers, were in unsafe positions beyond his target or "down range".

52. Defendant Jenison did not reasonably believe it was necessary to use deadly force. He acted recklessly and deliberately when he shot and killed J.A. J.A.'s conduct of simply backing his mom's minivan out of the family garage did not justify or necessitate defendant Jenison arresting him, shooting at him or taking his life.

COUNT I

**42 U.S.C. § 1983 - Use of Excessive Force Violation of Fourth & Fourteenth Amendment
(Plaintiff vs. Defendant Jenison)**

53. Plaintiff incorporates by reference all previous paragraphs as though fully set forth herein.

54. The Fourth Amendment provides that citizens of the United States are to be free from unreasonable search and seizures of their person, and prohibits the use of excessive force against citizens, including Plaintiff.

55. Defendants knew or should have known that the Fourth Amendment prohibits the use of excessive force against citizens, including Plaintiff.

56. Defendant Jenison used excessive force in violation of the constitutional rights of Plaintiff when he shot and killed him.

57. Defendants acted or failed to act under the color of state law at relevant times herein. Defendant Jenison acting under the color of state law, caused J.A.' constitutional rights to be deprived.

58. The degree of force used by defendant Jenison was excessive because the amount of force used, which resulted in J.A.'s death, was not reasonable or necessary under the circumstances and was not that of a reasonable officer under the circumstances. Had defendant Jenison not used the degree of force described herein, J.A. would be alive.

59. Defendant Jenison knew or should have known the amount of force used and the manner in which he shot at and killed J.A. was not that of a reasonable officer under the circumstances.

60. Defendant Jenison knew or should have known the excessive force exerted by him and set forth with more particularity above violated the constitutional rights of J.A. to be free from unreasonable seizure and excessive force.

61. Defendant Jenison used excessive and deadly force in violation of the constitutional rights of J.A. when he shot decedent J.A. after responding to a welfare call regarding protecting the well-being of J.A. An actionable seizure occurred pursuant to the Fourth Amendment when J.A. was shot and eventually lost his life as a result. This seizure was unreasonable in light of the facts and circumstances alleged herein.

62. The degree of force used by defendant Jenison was excessive because it was not reasonably necessary to interact with or check the welfare of J.A.

63. Defendant Jenison unnecessarily escalated the situation when he un-holstered his weapon, took aim at J.A. through the minivan and placed himself unnecessarily near the rear of the Albers minivan when he knew it was backing out of the garage. Defendant Jenison unnecessarily failed to move further away from the minivan when it was the easiest and most viable option.

64. Defendant Jenison unnecessarily escalated the situation by failing to take an appropriate officer safety position when approaching the moving vehicle, and failed to address the situation as required by his training and O.P.P.D. policies and procedures. He unnecessarily fired thirteen shots at J.A. when defendant Jenison was not in the path of the minivan or in close enough range to be considered dangerous.

65. Defendant Jenison failed to properly identify himself to J.A. or otherwise announce his presence on the Albers' property. The only word spoken to J.A. by any police officer that day was "stop."

66. Defendant Jenison failed to properly attempt to communicate with J.A. despite having more than adequate time to do so before killing him.

67. Defendant Jenison failed to take other more reasonable, readily available, and non-life threatening methods at stopping the minivan if stopping the minivan was truly necessary.

68. Defendant Jenison was a safe distance from the vehicle when he fired the shots that killed J.A., and further, defendant Jenison was a safe distance from J.A. when he fired into the vehicle using deadly force against J.A. when defendant Jenison could not have been in danger for his own life as he was merely standing next to the vehicle when he fired the shots that ultimately killed decedent, J.A.

69. No reasonable officer in the position of defendant Jenison would have used deadly force in shooting the subject of a welfare check when attempting to get that person to stop or exit their vehicle. No reasonable officer further would shoot into a moving vehicle as it was passing safely by the officer in a different direction as the officer would not be in danger of being harmed. Additionally, no reasonable officer would shoot into a moving minivan when he did not confirm the number of occupants or their identity.

70. Any reasonable officer would have known that shooting at J.A. 13 times, hitting him 6 of those times and killing him under these circumstances was an unlawful and unreasonable use of excessive force.

71. Defendant Jenison's own reckless and deliberate conduct described herein unreasonably created the situation in which defendant Jenison unreasonably shot decedent J.A. through his minivan and caused his death.

72. Defendant Jenison's conduct of continuing to shoot directly at J.A. when the minivan was no longer moving was unreasonable and caused his death.

73. At the time defendant Jenison shot at J.A., defendant Jenison was not in an area of danger where he could be injured because shots were fired at J.A. as J.A.' minivan was slowly passing defendant Jenison in an entirely different direction.

74. Defendant Jenison's conduct of shooting at J.A. thirteen (13) times was unreasonable and excessive.

75. Had defendant Jenison taken a proper safety position when approaching the minivan, the events leading up to the shooting and death of J.A. would not have occurred. Further, had defendant Jenison not intentionally placed himself near the minivan when he knew it was backing out from the garage, the events leading up to the shooting and death of J.A. would not have occurred. Had defendant Jennison announced his presence as a law enforcement officer or attempted to communicate with J.A. the events described herein would not have occurred. Finally, had defendant Jenison simply allowed J.A. to back his minivan out of his garage, used other non-lethal methods at stopping the van, or simply moved further away from the minivan, J.A.'s death would not have occurred. J.A.'s conduct of simply backing his mom's minivan out of his garage during a welfare check did not necessitate taking him into custody or killing him.

76. Defendant Jenison's use of deadly force was unreasonable and he recklessly brought about the need for him to use the unnecessary deadly force described herein.

77. The acts of defendant Jenison, were wanton, malicious, evil, oppressive or involved reckless indifference to the federally protected rights of decedent, J.A., thus entitling plaintiff to an award of punitive or exemplary damages against defendant Jenison.

78. The conduct of defendant has caused plaintiff damages including, but not limited to:

- a. Pain, suffering, fear, anxiety, emotional distress prior to his death,
- b. Physical pain and suffering from the gunshot wounds prior to his death,
- c. The knowledge of impending death,
- d. The loss of income, filial care, attention, services, guidance, advice, care and companionship,
- e. Economic damages associate with his death including funeral expenses and medical care provided, and

f. The loss of his life.

79. Plaintiff is entitled to recover from defendant reasonable attorney fees and expenses provided by 42 U.S.C. § 1988.

WHEREFORE, plaintiff requests that the Court, after a trial by jury of the claims, enter judgment against defendant, for their actual damages, compensatory damages or nominal damages, for punitive or exemplary damages, for attorney fees and expenses pursuant to 42 U.S.C. § 1988, the costs, and for any relief the Court deems necessary and just.

COUNT II

42 U.S.C. § 1983 - Violative Policies, Procedures, Practices and Customs

(Plaintiff vs. Defendant O.P.P.D.)

70. Plaintiff incorporates by reference all previous paragraphs as though fully set forth herein.

71. There existed within the defendant Overland Park Police Department policies, procedures, customs, practices or usages that are so pervasive, that they constitute the policy of the Overland Park Police department and are the moving force behind the constitutional deprivations of decedent J.A. and caused damages as previously stated.

72. The policies, practices, procedures, customs and usages that exist are:

- a. That officers of the Overland Park Police Department use excessive force, including deadly force, without regard for the need for the use of force, or without regard for the legality of its use.
- b. That officers of the Overland Park Police Department can use excessive force when it is not necessary and warranted where the O.P.P.D. failed to take action or adequately punish officers that violate the constitutional rights of its citizens as more fully described above;

- c.** That officers of the Overland Park Police Department engage in conduct that is violative of the constitutional rights of its citizens of the United States, with whom they come in contact, including but not limited to: unjustifiably detaining and/or shooting people in violation of the Constitution of the United States;
- d.** That defendant Overland Park Police Department willfully and deliberately fail to supervise and train its officers when lethal force can and should be used, and allows its officers to use deadly force when it is not warranted or called for in violation of citizens' constitutional rights;
- e.** That officers of the Overland Park Police Department are allowed to fire into moving vehicles when it constitutes an unreasonable danger and is not consistent with present day police policies and procedures;
- f.** That officers of the Overland Park Police Department are not fully or properly trained on how to respond to a crisis intervention call for service and are allowed to respond to said calls without direction and in an inconsistent manner;
- g.** That officers of the Overland Park Police Department are not properly trained or instructed on how to safely approach a slow moving vehicle and are allowed to approach in the manner described with more specificity herein; and
- h.** That officers of the Overland Park Police Department are allowed to undertake the activities described with more specificity herein.

73. Defendant O.P.P.D. is and was vested with the authority to train, supervise, discipline, and otherwise control the officers of the Overland Park Police Department. Defendant Overland Park Police Department failed to change its orders, policies, procedures,

practices, customs, and usages by failing to properly hire, train, supervise, discipline, and control the officers of the Overland Park Police Department including failing to act in the face of transgressions, deficiencies, and unconstitutional conduct of its officers of which they knew or should have known.

74. As the lawfully designated policy making body, defendant O.P.P.D. has the power and responsibility to prevent the existence of the conduct, policies, procedures, practices and customs which violate the constitutional rights of citizens of the United States, and have failed to and refused to do so, and, therefore, has been and continues to be deliberately indifferent to the rights of the citizens of the United States, with whom the police officers of Overland Park come in contact. The failure of defendant Overland Park Police Department to act in the face of constitutionally violative conduct caused the constitutional deprivations that have been suffered by decedent J.A.

75. There exists within the O.P.P.D. employee hiring, training and supervision and retention policies, procedures and practices that are so pervasive they constitute the policy of O.P.P.D. and were a moving force behind and thereby caused the constitutional deprivations suffered by plaintiff. There has been a failure to adopt employee hiring, training, supervision and retention policies, procedures and practices which would have prevented the constitutional deprivations suffered by plaintiff alleged herein.

76. Defendant Overland Park Police Department enacted, condoned, ratified and allowed the policies, procedures, practices, customs, and usages set above which caused or contributed to cause the unconstitutional violations and death of J.A., and damages sustained by J.A.

77. In their failures, policies, procedures, practices, customs and usages, as previously described, defendant O.P.P.D. intentionally disregarded known facts or alternatively,

was deliberately indifferent to a risk of constitutional violation of which they knew or should have known, and their culpability caused the constitutional violations to decedent J.A. in causing his death and the damages to J.A.

78. The acts of defendant were wanton, malicious, evil, oppressive or involved reckless indifference to the federally protected rights of decedent, J.A., thus entitling plaintiff to an award of punitive or exemplary damages against defendant Jenison.

79. The policies, procedures, practices, customs and usages and conduct of defendant has caused plaintiff damages including but not limited to:

- a. Pain, suffering, fear, anxiety, emotional distress prior to his death,
- b. Physical pain and suffering from the gunshot wounds prior to his death,
- c. The knowledge of impending death,
- d. The loss of income, filial care, attention, services, guidance, advice, care and companionship,
- e. Economic damages associate with his death including funeral expenses and medical care provided, and
- f. The loss of his life.

80. Plaintiff is entitled to recover from defendants reasonable attorney fees and expenses provided by 42 U.S.C. § 1988.

WHEREFORE, plaintiff requests that the Court, after a trial by jury of the claims, enter judgment against defendant, for actual damages or nominal damages, for attorney's fees and expenses pursuant to 42 U.S.C. § 1988, costs, for exemplary or punitive damages and for any other relief the Court deems necessary and just.

DEMAND FOR JURY TRIAL

Plaintiff demands a jury trial on all counts.

DESIGNATION OF PLACE OF TRIAL

Plaintiff hereby designates United States District Court for the District of Kansas at Kansas City, Kansas as the place of trial.

Respectfully submitted,

**BARTIMUS FRICKLETON ROBERTSON
RADER, P.C.**

BY: /s/ Michael C. Rader

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ATTORNEYS FOR PLAINTIFF

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
AT KANSAS CITY, KANSAS**

SHEILA ALBERS, as Administrator of the)
Estate of J.A., Deceased,)

Plaintiff,)

v.)

CLAYTON JENISON and)
THE CITY OF OVERLAND PARK, KANSAS)

Defendants.)

Case No. 2:18-cv-02185-DDC-JPO

ANSWER

COMES NOW the Defendants, the City of Overland Park, Kansas and Clayton Jenison and for their answer to Plaintiff's Complaint state and allege as follows:

1) The Defendants deny each and every allegation in Plaintiff's Complaint not expressly admitted herein below. In particular, they deny that they violated the constitutional rights of Plaintiff's decedent, J.A. Moreover, they assert that Plaintiff has failed to state a claim.

2) The Defendants are without sufficient knowledge or information to admit or deny the allegations in Paragraph 1.

3) With regard to Paragraph 2, the Defendants admit that Jenison was a duly sworn law enforcement officer employed by the City and acting under a color of state law at the time of the events in the Complaint. The Defendants deny that Jenison had any policymaking authority or that he was responsible for the administration, implementation and authorization of police services.

4) With regard to Paragraph 3, the Defendants admit that the City is a municipality organized under the laws of the State of Kansas and located in Johnson County, Kansas. The

Defendants deny that OPPD is an entity that can sue or be sued and, therefore, the remainder of these allegations are denied.

5) With regard to Paragraph 4, the Defendants admit that venue is proper in this Court but deny any act or omission giving rise to a cause of action.

6) With regard to Paragraph 5, the Defendants admit that this Court has jurisdiction over Plaintiff's constitutional claims pursuant to §1331 and 1343 but deny that diversity of jurisdiction is a proper basis for the court's jurisdiction. The Defendants further deny a violation of J.A.'s constitutional rights.

7) The Defendants are without sufficient knowledge or information to admit or deny the allegations in Paragraph 6.

8) With regard to Paragraph 7, the Defendants admit that when the Officers arrived at the Albers' family residence on January 20, 2018, J.A. had been left home alone by the Plaintiff and her husband being aware the J.A. was in a crisis state.

9) Paragraph 8 is admitted with the exception of the purpose of the call which was reported as a "suicidal subject."¹

10) Paragraph 9 is denied as the Defendants have learned J.A. had threatened suicide on a number of occasions. Specifically, during the investigation J.A.'s friends and acquaintances informed officers that J.A. had threatened suicide in the past. J.A. had also threatened suicide via social media communications in the hours before his death and had in fact stabbed himself multiple times. In addition, during an incident on December 17th, 2017 Plaintiff Sheila Albers showed officers a text message that J.A. had sent his girlfriend where J.A. insinuated he was going to kill

¹ In fact, the content of the dispatch call for "suicidal subject" is widely known having been the subject of an article in the Kansas City Star, <http://www.kansascity.com/news/local/article196695059.html>, where the recording is included.

himself. Plaintiff Sheila Albers emailed this text to officers and is aware of its existence, despite her claims in the Complaint.

11) Paragraph 10 is denied as Defendant Jenison did receive training in verbal communication and crisis intervention/behavior management/interactions with special populations.

12) Paragraph 11 is denied as Defendant Jenison had received training in crisis intervention/behavior management/interactions with special populations.

13) With regard to Paragraph 12, the Defendants admit that Defendant Jenison and others were dispatched to the residence and one of the responding officers made the statement concerning his familiarity with J.A. because of previous contacts where J.A. ran from police and claimed that he “wanted to fight the cops.” In addition, Defendant City was familiar with J.A. due to numerous previous contacts, including:

- a. OPPD Case# 2015-0496: J.A. was a suspect in a criminal sodomy allegation. After consulting an attorney, Plaintiff Sheila Albers and her husband refused to cooperate or allow minor J.A. to cooperate in the investigation.
- b. OPPD Case# 2015-006676: J.A. had an electronic cigarette in his possession at school.
- c. OPPD Case# 2015-008094: J.A. was a suspect in a theft, victim declined prosecution once the stolen item was returned.
- d. OPPD Case# 2016-003084: Plaintiff Sheila Albers reported J.A. as a runaway to OPPD.
- e. OPPD Case# 2016-003126: Plaintiff Sheila Albers contacted OPPD to report J.A. had pushed her and kicked his younger brother in the stomach while taking

pizza from the family kitchen after she stated he couldn't have any for getting in trouble. Resulted in 2 battery counts filed in Johnson County District Court.

- f. OPPD Case# 2016-005140: Plaintiff Sheila Albers and her husband contacted OPPD because J.A. was throwing furniture in their home and fighting with Mr. Albers over an e-cigarette.
- g. OPPD Case# 2016-006111: Plaintiff Sheila Albers contacted OPPD to report J.A. was upset and throwing things in the house after she confronted him for stealing food at school. Plaintiff Sheila Albers stated J.A. had flipped over furniture, threw a phone at her, and had chased his younger brother while yelling he was going to [do bodily harm to him].
- h. OPPD Case# 2016-010523: J.A. was with another individual who was arrested for marijuana possession.
- i. OPPD Case# 2016-015574: Plaintiff Sheila Albers contacted OPPD from the Emergency Room stating that J.A. had hit her with a rolling chair which caused a cut above her eye and resulted in her needing stitches. Plaintiff Sheila Albers declined to prosecute J.A. for battery.
- j. OPPD Case# 2016-020595: J.A. had skipped school to drink beer from the Albers' home.
- k. OPPD Case# 2016-021596: J.A. admitted to smoking marijuana in a school restroom with another individual who was cited for possession of marijuana.
- l. OPPD Case# 2016-024764: Plaintiff Sheila Albers and her husband contacted OPPD to report J.A. was being defiant, refusing to get out of bed and go to school.

- m. OPPD Case# 2017-005391: J.A. was involved in a one vehicle crash where he struck a light pole after trying to negotiate a turn at high speed.
- n. OPPD Case# 2017-026621: Plaintiff Sheila Albers and her husband called OPPD to their residence. J.A. was intoxicated and beating his father in the driveway of the Albers' residence. J.A. ignored officers' commands to stop and was threatened with being tased. J.A. fled on foot before being apprehended by officers. A Preliminary Breath Test showed J.A.'s Blood Alcohol Content to be .198. Plaintiff Sheila Albers and her husband declined to press charges against J.A.
- o. OPPD Case# 2017-027059: J.A. was listed as a missing person/runaway after stealing his father's Acura. J.A.'s girlfriend contacted Mr. Alber's as she was in fear for her safety due to J.A.'s erratic driving. When Mr. Alber's arrived at their location, J.A. jumped into Mr. Alber's vehicle and fled to a friend's house. When OPPD Officers responded, J.A. drove the stolen vehicle towards a responding officer, swerving in time to avoid striking the officer. J.A.'s friend reported to Officers that J.A. had made threats to kill himself and to just be done with it all.
- p. OPPD Case# 2017-027079: J.A. was still listed as a runaway from OPPD Case 2017-027059. Plaintiff Sheila Albers and her husband located J.A. in a vehicle with two friends. Upon their arrival, J.A. tried to flee on foot and Mr. Albers restrained him. J.A. called out to his friends for help and they responded, one carrying a bat. J.A. again escaped from Mr. Albers. The two friends and J.A. then fled the area in a vehicle, running over Mr. Alber's foot in the process. It

was determined that J.A. had battered a juvenile female during this incident as well. J.A. was arrested the following day for domestic battery.

- q. OPPD Case# 2018-001364: J.A. was listed as a suspect in a theft report at Scheels. It was reported that J.A. had ripped the tags off of approximately \$300 worth of clothing and hid them on his person. J.A later admitted his intent to steal the items. No charges were sought as this incident took place the same day as J.A.'s death.

All of the above establishes why the Defendant City was familiar with J.A. and in many instances demonstrating his propensity for violence.

14) With regard to Paragraph 13, the Defendants admit that two OPPD vehicles arrived at or near the same time at the Albers' residence but are without sufficient knowledge or information to admit or deny the precise location of each vehicle.

15) With regard to Paragraph 14, the Defendants admit that two officers exited their vehicles and approached the Albers' residence, communicated for several minutes, and the unnamed officer returned to his patrol vehicle to retrieve his cellular telephone in attempt to contact the Plaintiff to facilitate communication with J.A. It is also admitted that at this time Defendant Jenison was positioned at or near a tree in the Albers' yard. The Defendants are without sufficient knowledge or information to admit or deny the exact location of the tree.

16) With regard to Paragraph 15, the Defendants admit that at no point did either officer attempt to knock on the Albers' door because they had no time to do so. While the officers did respond to the call with lights and sirens, Defendants admit that the patrol vehicles did not have lights or sirens activated while sitting in the neighborhood as to do so would be contrary to accepted police practices given the nature of the call.

17) With regard to Paragraph 16 the Defendants admit that the unidentified officer jogged to his patrol vehicle to retrieve his cellular telephone while Defendant Jenison left his position near the tree and walked toward the Albers' house, under the impression that a woman arriving on scene was J.A.'s mother.

18) With regard to Paragraph 17, the Defendants admit that as Defendant Jenison walked toward the Albers' house their two-car garage door began to rise and Defendant Jenison unholstered his service weapon as he walked toward the rising garage door giving commands to J.A. Defendants deny the weapon was a 9 mm pistol but admit that Jenison's weapon was loaded with "hollow point" bullets which is standard issue for police departments nationwide.

19) Paragraph 18 is denied.

20) With regard to Paragraph 19, the Defendants admit that prior to his death on the evening of January 20, 2018, J.A. did not communicate with the officers in any manner. The Defendants deny that J.A. did not communicate with the officers earlier in the day as he was arrested for a theft at Scheels. Defendants deny that it was a welfare check and deny that they failed to communicate with him having specifically given J.A. verbal commands to stop the vehicle. Further, Defendant Jenison was clothed in a standard OPPD uniform which clearly identified himself as a law enforcement officer, and the Albers' minivan was equipped with a functioning back-up camera. The Defendants are without sufficient knowledge or information to admit or deny the remaining allegations.

21) With regard to Paragraph 20, the Defendants admit that Defendant Jenison continued to approach the garage door as it slowly rose. They are without sufficient knowledge or information to admit or deny the remaining allegations.

22) With regard to Paragraph 21, the Defendants admit that Defendant Jenison observed the rear lights of the minivan and heard the engine running. They are without sufficient knowledge or information to admit or deny the remaining allegation.

23) With regard to Paragraph 22, the Defendants admit that at some point Defendant Jenison observed the white reverse lights. They are without sufficient knowledge or information to admit or deny the remaining allegation.

24) With regard to Paragraph 23, the Defendants admit that Defendant Jenison observed the minivan prepare to back up, begin slowing backing up, and then accelerating faster out of the garage. The Defendants admit that Defendant Jenison was not in a confined space but assert that he had no way of determining at this juncture the path of the vehicle.

25) Paragraph 24 is denied.

26) Paragraph 25 is denied.

27) Paragraph 26 is denied.

28) Paragraph 27 is denied.

29) With regard to Paragraph 28, the Defendants admit that J.A. backed the minivan out of the garage but are without sufficient knowledge or information to admit or deny its speed other than it increased its acceleration out of the garage. Defendants admit that Defendant Jenison gave verbal commands for J.A. to stop and when J.A. did not do so Defendant Jenison fired his weapon based on his reasonable fear that J.A. would harm Defendant Jenison and/or others. The remainder of the allegations are denied.

30) Paragraph 29 is denied.

31) Defendants are without sufficient knowledge or information to admit or deny the allegations in the [Second] Paragraph 25.

32) Paragraph [Second] 26 is denied.

33) With regard to the [Second] Paragraph 27, these allegations are denied because Defendant Jenison was dressed in a standard issue OPPD uniform clearly identifying himself as a law enforcement officer, Defendant Jenison repeatedly yelled “Stop”, and the Albers’ minivan was equipped with an operating back-up camera allowing J.A. to see who and what was behind him.

34) The [Second] Paragraph 28 is denied.

35) The [Second] Paragraph 29 is denied.

36) With regard to Paragraph 30, the Defendants admit that the minivan momentarily came to a complete stop in the driveway and then rapidly making a J-turn, accelerating in reverse back up the driveway showing J.A.’s control of the vehicle placing Defendant Jenison in a zone of danger. All other allegations are denied.

37) With regard to Paragraph 31, the Defendants admit that the minivan continued to travel in reverse toward the Albers’ residence. All other allegations are denied.

38) With regard to Paragraph 32, the Defendants admit that Jenison discharged his weapon approximately 11 additional times. All other allegations are denied.

39) Paragraph 33 is denied.

40) Defendants are without sufficient knowledge or information to admit or deny the allegations in Paragraph 34.

41) With regard to Paragraph 35, the Defendants admit that the minivan moved forward out of the driveway at or about the time the shooting stopped. The Defendants are without sufficient knowledge or information to admit or deny whether the minivan was in neutral. All other allegations are denied.

42) With regard to Paragraph 36, the Defendants admit that the minivan rolled across the street and came to rest in a neighbor's front yard. The Defendants are without sufficient knowledge or information to admit or deny whether the minivan was in neutral. All other allegations are denied.

43) Paragraph 37 is denied.

44) Paragraph 38 is denied.

45) With regard to Paragraph 39, the Defendants allege that the autopsy report is a written document that speaks for itself and all allegations inconsistent therewith are denied.

46) Paragraph 40 is denied.

47) With regard to Paragraph 41, the Defendants allege that the autopsy report is a written document that speaks for itself and all other allegations inconsistent therewith are denied. Defendants specifically denies that a .041 blood alcohol level is not intoxication given J.A.'s age and size. Moreover, the administrative legal blood alcohol limit in Kansas for a 17-year-old is .02.

48) With regard to Paragraph 42, the Defendants allege that the vehicle in this case was being used as a means of deadly force and the referenced policies are written documents that speak for themselves and all allegations inconsistent therewith are denied.

49) With regard to Paragraph 43, the Defendants allege that the policy is a written document that speaks for itself and all allegations inconsistent therewith are denied. In addition, Defendants specifically deny the allegation that J.A. never used or threatened to use deadly force as the minivan was being used as a means of deadly force.

50) With regard to Paragraph 44, the Defendants allege that the policy is a written document that speaks for itself and all other allegations are denied.

51) Paragraph 45 is denied.

52) Paragraph 46 is denied.

53) Paragraph 47 is denied.

54) Paragraph 48 is denied.

55) Paragraph 49 is admitted.

56) The Defendants deny Paragraph 50 as to the allegations related to 9mm hollow point bullet and “other targets.” The Defendants are without sufficient knowledge or information to admit or deny the other allegations in Paragraph 50.

57) Paragraph 51 is denied.

58) Paragraph 52 is denied.

59) With regard to Paragraph 53, the Defendants incorporate by reference their admissions and denials to Paragraphs 1-52 as if fully set forth herein.

60) Paragraph 54 is a statement of law to which no answer is required. In the alternative, the Fourth Amendment speaks for itself and all allegations inconsistent therewith are denied.

61) Paragraph 55 is a statement of law to which no answer is required. In the alternative, the Fourth Amendment speaks for itself and all allegations inconsistent therewith are denied.

62) Paragraph 56 is denied.

63) Paragraph 57 is denied.

64) Paragraph 58 is denied.

65) Paragraph 59 is denied.

66) Paragraph 60 is denied.

67) Paragraph 61 is denied.

68) Paragraph 62 is denied.

69) Paragraph 63 is denied.

70) Paragraph 64 is denied.

71) Paragraph 65 is denied.

72) Paragraph 66 is denied.

73) Paragraph 67 is denied.

74) Paragraph 68 is denied.

75) Paragraph 69 is denied.

76) Paragraph 70 is denied.

77) Paragraph 71 is denied.

78) Paragraph 72 is denied.

79) Paragraph 73 is denied.

80) Paragraph 74 is denied.

81) Paragraph 75 is denied.

82) Paragraph 76 is denied.

83) Paragraph 77 is denied.

84) Paragraph 78 is denied.

85) Paragraph 79 is denied.

86) With regard to the [Second] Paragraph 70, the Defendants incorporate by reference their admissions and denials to Paragraphs 1-79 as if fully set forth here.

87) The [Second] Paragraph 71 is denied.

88) The [Second] Paragraph 72 is denied.

89) The [Second] Paragraph 73 is denied.

90) The [Second] Paragraph 74 is denied.

91) The [Second] Paragraph 75 is denied.

92) The [Second] Paragraph 76 is denied.

93) The [Second] Paragraph 77 is denied.

94) The [Second] Paragraph 78 is denied.

95) The [Second] Paragraph 79 is denied.

96) Paragraph 80 is denied.

97) Further answering, the Defendants allege that Plaintiff fails to state a claim upon which relief may be granted in either an individual or official capacity. In particular, the allegations fail to state facts that would give rise to a plausible claim for relief.

98) Further answering, the Defendants allege that Plaintiff has failed to state a claim for the deprivation of rights under the United States Constitution.

99) Further answering, the Defendants allege that Defendant Jenison acted with objective reasonableness under the circumstances then existing and his conduct was justified and privileged.

100) Further answering, the Defendants allege that Defendant Jenison had probable cause to use deadly force given his knowledge that J.A. was reported as suicidal, was operating a van and posed a danger to Defendant Jenison and the public while recklessly operating that van.

101) Further answering, the Defendants allege that the absence of an underlying constitutional violation precludes liability for individual-capacity and official-capacity claims.

102) Further answering, the Defendants allege that Plaintiff's allegation of inadequate training fails to satisfy the standard of liability required by *Board of County Commissioners of Bryan County v. Brown*, 520 U.S. 397 (1997).

103) Further answering, the Defendants allege that Defendant Jenison is entitled to qualified immunity as well as those immunities available at common law and under the United States Constitution.

104) Further answering, the Defendants allege that there was no prior conduct of Defendant Jenison or others of the OPPD that made the necessity for additional training obvious or that the need was deliberately ignored.

105) Further answering, the Defendants allege that Plaintiff may not recover punitive damages against a municipality. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 24, 271 (1981).

106) Further answering, Defendants allege that Plaintiff is not entitled to punitive damages for any one or more of the following reasons:

- a. The standards by which Defendants' conduct is to be determined as alleged by Plaintiff are vague and wholly arbitrary and, as such, deny due process in violation of the Fifth and Fourteenth Amendments of the United States Constitution;
- b. The standards for determining the amount and/or subsequent imposition of punitive damages are vague, supply no notice to the Defendants of the potential repercussions of the alleged conduct, and are subject to the unbridled discretion of the fact finder thereby denying due process under the Fifth and Fourteenth Amendments of the United States Constitution;
- c. Plaintiff's request for punitive damages is criminal in nature and the rights given Defendants in criminal proceedings under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution are applicable;
- d. Plaintiff's request for punitive damages constitutes a request for and/or imposition of excessive fines in violation of the Eighth Amendment of the United States Constitution;
- e. Plaintiff's request for punitive damages constitutes cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution;
- f. Plaintiff's request for punitive damages constitutes a denial of equal protection of the law in violation of the Fifth and Fourteenth Amendments of the United States Constitution in that Defendants' wealth or net worth may be considered

by a fact finder in determining the award of damages in a punitive damages award;

- g. Plaintiff's request for punitive damages cannot protect Defendants against multiple punishments for the same alleged wrong, thereby denying due process under the Fifth and Fourteenth Amendments of the United States Constitution;
- h. An award of punitive damages would violate Defendants' due process under the United States Constitution as well as in violation of the United States Supreme Court's decision in *Pacific Mutual Insurance Co. v. Haslip*;
- i. To the extent Defendants are being sued in its representative and/or official capacity, Plaintiff is not entitled to any punitive damage award against it, and because punitive damages may not be awarded against a governmental entity in a claim under 42 U.S.C. § 1983 or under 42 U.S.C. § 2000 pursuant to the United States Supreme Court's opinion in *City of Newport v. Fact Concerts, Inc.*

107) Further answering, these Defendants allege that the Complaint asserts liability based on, at most, negligent behavior which is insufficient to state a violation under 42 U.S.C. §1983.

108) Further answering, these Defendants reserve the right to assert any additional defenses revealed during the course of discovery.

WHEREFORE, having fully answered Plaintiff's Complaint, the Defendants pray that Plaintiff take nothing by her action, for their costs and attorney fees pursuant to 42 U.S.C. § 1988 and for such other and further relief as the Court deems just and equitable.

DEMAND FOR JURY TRIAL

Defendants demand a trial by jury on all issues and claims asserted in Plaintiff's Complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of May, 2018, the foregoing was filed electronically with the Clerk of the District Court, and a service copy was sent via e-mail on the following:

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
AT KANSAS CITY, KANSAS

SHEILA ALBERS, as Administrator of the)
Estate of J.A., Deceased,)
)
Plaintiff,)
)
v.)
)
CLAYTON JENISON and)
THE CITY OF OVERLAND PARK, KANSAS)
)
Defendants.)

DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION FOR JUDGMENT ON
THE PLEADINGS

Respectfully submitted,

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I. INTRODUCTION

The Plaintiff, Sheila Albers, brings this action pursuant to 42 U.S.C. §1983 on behalf of the Estate of her deceased son, J.A., alleging a violation of his constitutional rights when he was shot and killed by Defendant Jenison when J.A. attempted to run over Jenison with the family van. Plaintiff alleges a violation of J.A.'s rights under the Fourth and Fourteenth Amendment claiming that Jenison used excessive force [Complaint, Doc. 1, Count I]. Additionally, the Plaintiff alleges a claim against the Overland Park Police Department asserting that it had policies and procedures that were the moving force behind the constitutional deprivations related to the use of excessive force and failure to train. [Doc. 1, Count II].¹

This Court should dismiss Plaintiff's claims for many reasons. First, Jenison had a legitimate fear that J.A., while operating the family van, posed a lethal threat to both the traveling public and Jenison. Jenison used only that force which was objectively reasonable under the circumstances as he perceived them at the time of the event. In addition, Jenison is entitled to qualified immunity. Second, the City is entitled to dismissal in the first instance because there is no underlying viable claim for a violation of J.A.'s constitutional rights. Alternatively, the City is entitled to dismissal because there was no policy or procedure properly alleged by the Plaintiff that was the moving force behind any constitutional deprivation.

II. GOVERNING STANDARDS

A. Fed. R. Civ. P. 12(c).

The Defendants contend that the Complaint fails to state a claim upon which relief may be granted. This motion technically arises under Rule. 12(c) because the Defendants previously filed an Answer invoking immunity defenses. See Doc. 6; *Brown v. Montoya*, 662 F. 3d. 1152,

¹ While the Overland Park Police Department is not an entity that can sue or be sued, the Plaintiff has properly named the City within the content of her Complaint.

1160 n.4 (10th Cir., 2011). Even so, the standards applicable to Rule 12(b)(6) and 12(c) motions are the same. See generally *Morris v. City of Colo. Springs*, 666 F. 3d. 654, 660 (10th Cir., 2012). The Court must therefore determine whether the Complaint contains factual assertions describing the grounds entitling this Plaintiff to relief from the named Defendants. See Fed. R. Civ. P. 8(a); *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Kan. Penn Gaming, LLC v. Collins*, 656 F. 3d 1210, 1214-15 (10th Cir., 2011).

B. Standard concerning matters outside the Complaint.

“[N]otwithstanding the usual rule that a Court should consider no evidence beyond the pleadings on a Rule 12(b)(6) motion to dismiss, the Court may consider documents referred to in the complaint if the documents are central to the Plaintiff’s claim and the parties do not dispute the documents’ authenticity.” *Alvarado v. KOB-TV, LLC*, 493 F.3d 1210, 1215 (10th Cir. 2007) (quoting *Jacobsen v. Deseret Book Co.* 287 F.3d. 936, 941 (10th Cir. 2002)).

Here, the Defendants have or will, after leave is granted, file conventionally an audio/video disc that contain recordings maintained in the normal course of business by the City and which were recorded from 911 dispatchers and in-car cameras of the various officers on the scene which depict the event as referred to in Plaintiff’s Complaint. [Doc. 1, ¶57]. These make clear that the allegations in Plaintiff’s Complaint are inaccurate. They are particular relevant since the Plaintiff, in her Complaint, plainly references them and includes screen shots from them.

In *Hyung Seok Koh v. Graf*, 2013 WL 5348326 (N.D. Ill. Sept. 24, 2013) the Court discussed the use of video evidence at the motion to dismiss stage. There, the Court relied upon *Scott v. Harris*, 550 U.S. 372 (2007) where Harris sued Officer Scott under § 1983 for excessive force resulting in an unreasonable seizure after Scott rammed Harris’s car during a high-speed chase. At the summary judgment stage, Scott asserted qualified immunity, which the Supreme Court held that he was entitled to. In so holding, the Supreme Court viewed a videotape of the

high-speed chase and found that the video showed that the chase placed police officers and innocent bystanders in serious danger. The Supreme Court viewed the other facts in the light most favorable to Harris but reasoned that the video so clearly contradicted Harris's version of the events that there was no genuine issue of material facts.

In applying the *Scott* case at the motion to dismiss stage, the Court in *Hyung Seok Koh* noted that even though *Scott* was decided at the summary judgment stage and not at the motion to dismiss stage much of the discussion of the video in *Scott* focused on how badly the video "utterly discredited" Harris's version of the events. See *Scott*, 550 U.S. 380-381; *Hyung Seok Koh* at *9. That is, the chase video utterly discredited the way that the chase was plead in Harris's complaint as well. The Court reasoned that it is likely that the Supreme Court would likewise have considered the video had they heard the case at the motion to dismiss stage. *Id.* Based upon the Court's interpretation of *Scott*, the Court in *Hyung Seok Koh* considered the video and granted the motion to dismiss.

More recently, in *Brokers' Choice of Am., Inc. v. NBC Universal, Inc.*, 861 F. 3d 1081, 1103-1104 (10th Cir., 2017) the Tenth Circuit affirmed the dismissal of the defamation claim on a 12(b)(6) standard rather than a summary judgment standard. In *Brokers' Choice*, the Tenth Circuit approved the dismissal of a defamation claim against Dateline NBC where the pleadings referred to a recording of a seminar that was allegedly taken out of context to portray an insurance sales seminar promoter in a false light. The entire "statement" of the defendant was a recorded TV show. The Court determined that because the issue was one of law, material falsity could be analyzed under a Rule 12(b)(6) motion as long as the District Court considers only the pleadings and materials that are: (1) attached to or referenced in the amended complaint, (2) central to the plaintiff's claim, and (3) undisputed as to their accuracy and authenticity. 861 F. 3d, 1104.

The same holds true here. In Plaintiff's Complaint, she specifically includes screenshots taken from one of the in-car cameras as well as photographs purportedly taken by a nearby Ring

Doorbell. She also makes specific reference to the reason for the dispatch. Because the Plaintiff relied upon this material in her Complaint, the Court should consider, at this stage, the entirety of the audio and video evidence of the event. This evidence totally discredits the allegations in Plaintiff's Complaint and should be considered.

Also, while a court considering a dispositive motion based upon qualified immunity "usually" must "adopt... the plaintiff's version of the facts," that is not true to the extent that there is clearly contrary to the video evidence of the incident at issue. *Scott*, 550 U.S. 378-80. ("When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.") See also, *Thomson v. Salt Lake City*, 584 F. 3d 1304, 1312 (10th Cir., 2009). There is no reason to apply a different standard at a motion for judgment on the pleadings so long as the court continues to view the evidence in the light most favorable to J.A. See *York v. City of Las Cruces*, 523 F. 3d. 1205, 1210-11. (10th Cir., 2008).

III. STATEMENT OF FACTS²

Sheila Albers is the mother and duly appointed Administrator of the Estate of J.A., deceased. [Doc. 1, ¶1]. On January 20, 2018 J.A. was home alone in the family residence located in Johnson County, Kansas [Doc. 1, ¶7]. That evening, the Defendants learned from a law enforcement dispatch radio communication that J.A. was at home and threatening to harm himself with a knife. [Doc. 1, ¶8]. Although the Complaint alleges that the officers were dispatched for the purpose of performing a "welfare check" the uncontroverted recordings make

² This Statement of Facts includes only those facts that were or could have been reasonably known to the Defendants which informed their actions.

clear that this was, instead, a suicide call. [**Exhibit 1**, Kohake Aff., ¶4, 5, and 6; Exhibit B attached thereto].³

The Complaint alleges that prior to this event the Defendants knew that J.A. had potential mental health issues and history, [Doc. 1, ¶9], and that Defendant Jenison had not received Crisis Intervention Training [“CIT”] which teaches officers how to de-escalate and diffuse mental health situations when answering calls for service. [Doc. 1, ¶10]. As officers were dispatched to the residence one of them reported by radio that “I am familiar with that kid.” [Doc. 1, ¶12]. Another officer, Officer Vendetti, broadcast over the radio that [J.A.] had previously run from the police and made statements about being a wrestler and wanting to fight police officers. [Kohake Aff. ¶2 and 3, Dispatch Recording OPTAC6 Audio [00:00:36]].

Two OPPD vehicles arrived almost simultaneously at the residence. The first vehicle, driven by Officer Newlon arrived and parked across the street approximately 30 yards to the east of the residence. [Doc. 1, ¶13, Kohake Aff. ¶2 and 3, Newlon Dashcam [17:45:40]]. Jenison arrived in a separate patrol car and parked around the corner on Hayes Street approximately 40-50 yards to the northwest of the residence. [Doc. 1, ¶13]. Both officers met and communicated for several minutes in the Albers driveway before Newlon returned to his patrol vehicle to retrieve his cellular telephone. [Doc. 1, ¶14, Newlon Dashcam [17:49:00]]. At the time the officers arrived on scene and were conferring in the driveway all of the garage doors on the residence were down. [Kohake Aff. ¶2 and 3, Newlon Dashcam [17:47:53]].

At some point in time Jenison was positioned at or near a tree located on the right side of the driveway of the residence. [Kohake Aff. ¶2 and 3, Newlon Dashcam [17:48:00]].

³ In fact, the content of the dispatch call for “suicidal subject” is widely known having been the subject of an article in the Kansas City Star, <http://www.kansascity.com/news/local/article196695059.html>, where the recording is included.

However, at no point did either officer attempt to knock on the Albers' door despite being on the property for several minutes. [Doc. 1, ¶15].

As Jenison walked toward the garage doors of the residence, the two-car garage door began to rise and Jenison unholstered his weapon. [Doc. 1, ¶17; Kohake Aff. ¶2 and 3, Newlon Dashcam [17:49:20]. As Jenison continued to approach the garage door with his weapon drawn he watched and listened for nine seconds as the garage door slowly continued to rise. [Doc. 1, ¶20]. During this timeframe Jenison could hear the minivan's engine running and observe the rear brake lights were activated. [Doc. 1, ¶21]. Shortly thereafter the white reverse taillights were illuminated indicating that the minivan was in reverse gear. At this point, Jenison is, generally, to the rear and right of the van. [Doc. 1, ¶22, Kohake Aff. ¶2 and 3, Newlon Dashcam [17:49:30]].

The minivan began backing out of the garage as Jenison moved toward the van. [Doc. 1, ¶24, Kohake Aff. ¶2 and 3, Newlon Dashcam [17:49:32]]. As the minivan continued backing out of the garage Jenison yelled "stop, stop, stop" and when the van did not stop fired his weapon two times [Doc. 1, ¶28, Kohake Aff. ¶2 and 3, Newlon Dashcam [17:49:38]]. At the time he fired his weapon, Jenison was clothed in a clearly identifiable OPPD uniform [Id.]

After the minivan reached the bottom of the driveway it paused, made a J-turn and began backing up the driveway toward the house. [Kohake Aff. ¶2 and 3, Newlon Dashcam [17:49:40]]. Jenison continued to give verbal commands for the van to stop and, when it did not, fired 11 more rounds at the van. [Doc. 1, ¶32, Kohake Aff. ¶2 and 3, Newlon Dashcam [17:49:44]].

After the shooting stopped, the minivan began rolling forward into the street and eventually came to rest in the neighbor's front yard. [Doc. 1, ¶35, 36, Kohake Aff. ¶2 and 3, Newlon Dashcam [17:49:57]].

IV. **ARGUMENTS AND AUTHORITIES**

A. **The Complaint fails to state a claim for deprivation of J.A.'s constitutional rights**

Invoking 42 U.S.C. §1983, the Complaint asserts that the Defendants violated J.A.'s constitutional right to be free from excessive force. To state such a claim, the Complaint must allege that a person acting under color of state law caused the plaintiff to be deprived of a right secured by the Constitution or the laws of the United States. See *Hall v. Witteman*, 584 F. 3d 859, 864 (10th Cir., 2009); *Lippoldt v. Cole*, 468 F. 3d 1204, 1219 (10th Cir., 2006). The Complaint fails to satisfy this standard.

1. **There is no allegation that Jenison violated J.A.'s clearly established constitutional right.**

a. **The use of deadly force against J.A. was not unreasonable.**

The Complaint contends that J.A.'s shooting death was a violation of his constitutional rights. In doing so, the Plaintiff invokes the Fourth and Fourteenth Amendments to the United States Constitution.⁴ See *Graham v. Connor*, 490 U.S. 386, 395 (1989). The reasonableness standard is an objective legal inquiry, judged not by the illuminating glow of hindsight nor the comfort of a judge's chambers, but rather from the on-scene perspective of an officer who is forced to make a split-second judgment in circumstances that are tense, uncertain and rapidly evolving. See *Plumhoff v. Rickard*, 134 Sup. Ct. 2012, 2020 (2014); *Saucier v. Katz*, 533 U.S. 194, 205 (2001).

“The use of deadly force is not unlawful if a reasonable officer would have had probable cause to believe that there was a threat of serious physical harm to himself or others.” *Thomas v.*

⁴ The Fourth Amendment exclusively controls excessive force claims. See *J.H., ex rel. J.P. v. Bernalillo County*, 806 F. 3d 1255, 1259-60 (2015). The text of the Complaint makes no allegations suggesting any substantive or procedural concerns that would trigger the Fourteenth Amendment and the Defendants presume that the Plaintiff's mention of the Fourteenth Amendment was solely to confirm that the Fourth Amendment rights have been incorporated as against state officers. See generally *Bailey v. United States*, 133 Sup. Ct. 1031 (2013). In any event, a post-deprivation state tort remedy is available to Plaintiff.

Durastanti, 607 F. 3d 655, 664 (10th Cir., 2010). In other words, “[a]n officer’s use of deadly force in self-defense is not constitutionally unreasonable.” *Sudac v. Hoang*, 378 F. Supp. 2d 1298, 1308 (D. Kan., 2005). The question, therefore, is whether a reasonable officer would have believed that J.A. “posed an immediate threat to the officers or the safety of others.” *Estate of Larsen, ex rel Sturdivan v. Murr*, 511 F. 3d 1255, 1260 (10th Cir., 2008). The answer is in the affirmative in both respects.

The Supreme Court has recognized that reasonableness is not an opportunity to second-guess an officer. “If an officer reasonably, but mistakenly, believed that a suspect was likely to fight back, for instance, the officer would be justified in using more force than in fact was needed.” *Saucier v. Katz*, 533 U.S. 194, 205 (2001). Indeed, a reasonable officer “need not await the “glint of steel” before taking self-protective action; by then it is “often...too late to take safety precautions” *Estate of Larsen*, 511 F. 3d 1260 (citation omitted). The same holds true for the hazard of a speeding vehicle in close proximity to an officer.

This reasonableness inquiry, therefore, depends upon the mosaic confronting the officers – the so-called “totality of the circumstances.” *Plumhoff*, 134 Sup. Ct. 2020. Such circumstances include: (1) Whether the officers ordered the suspect to drop his weapon, and the suspect’s compliance with police commands, (2) whether any hostile motions were made with the weapon toward the officer, (3) the distance separating the officers, and the (4) manifest intentions of the suspect. See *Estate of Larsen*, 511 F. 3d 1260 (listing factors for deadly force) accord *Graham*, 490 U.S. 396 (listing factors for generic excessive force as focusing on the severity of the crime, whether the suspect posed an immediate threat, and whether the suspect was resisting arrest). All factors – in isolation and in totality – confirm that Officer Jenison’s actions were not unreasonable.

First, no one disputes that Officer Jenison yelled at J.A. three times to stop the vehicle. [Doc. 1, ¶28, p. 12]. And, although the Plaintiff alleges that the van was slowly backing from

the garage by only referring to screenshots in the Complaint, the video evidence makes clear that the van accelerated backwards, performed a J-turn, and accelerated back up the driveway toward Jenison. Numerous Kansas Courts have already made clear that an automobile can constitute a deadly weapon. *State v. Whittington*, 260 Kan. 873, 878-79 (1996); *State v. Bailey*, 223 Kan. 178, 184 (1977); and *State v. Bradford*, 27 Kan. App. 2d 597, 600 (2000). This conduct alone makes clear that J.A. was not simply attempting to drive away but intended, if possible, to strike Jenison.

Next, the Plaintiff alleges sufficient information for the Court to determine that the distance separating Officer Jenison from the van was very close. With regard to the first two shots, Plaintiff alleges that Jenison was 5.9 feet and 6.3 feet away from the van. [Doc. 1, ¶29, pp. 12-15]. This well within the radius of the van. She then alleges that the next 11 shots are at distances from 3.6 to 18.9 feet. [*Id.*, ¶33, p. 15]. Thus, Jenison's close proximity to a wildly rotating van creates an objective threat to him. That threat is extended to the traveling public if J.A. drives off intent on committing suicide.

Finally, the manifest intentions of J.A. can best be demonstrated by virtue of the fact that the vehicle accelerated out of the garage, executed a J-turn, and then rapidly backed up the driveway toward Jenison. While no one can read J.A.'s mind, the video evidence coupled with knowledge of his intent to commit suicide does not demonstrate that J.A. was attempting to flee. Nor does it suggest a lack of control but rather a deliberate effort by J.A. to do harm.

The analysis of the "totality of the circumstances" does not end here, however. Although the Complaint alleges that the officers were dispatched on a "welfare check" the audio evidence from the dispatch tapes clearly indicate that J.A. was considered a "suicidal subject." This information framed the officers' knowledge as they approached the residence and reasonably gave them concern when J.A. attempted to leave operating the family van.

Taken as a whole, the Complaint and the audio/video recordings makes clear that Officer Jenison's use of force was not objectively unreasonable.

Finally, Plaintiff attempts to support her claim by using screen shots from both a neighborhood camera and in-car video from one of the officer's patrol vehicle. This methodology is misleading and does not reasonably assist the Court in understanding the split-second decisions required of Officer Jenison. A similar argument was made in *Dooley v. Tharp*, 856 F. 3d 1177 (8th Cir., 2017). There, the administrator of the estate of an individual who was shot and killed by a deputy sheriff brought a §1983 claim alleging excessive force in violation of the Fourth Amendment. The deputy, Tharp, testified about what he observed with regard to the decedent's conduct with regard to a rifle. There, Tharp testified that he "began screaming at "[Dooley] to drop the gun" and that he observed Dooley turn toward the officers and saw Dooley "raising his rifle and pointing it at me." Tharp testified that he believed that Dooley was going fire which resulted in Tharp shooting Dooley fatally.

The court noted that when viewed frame by frame, the body worn video appeared to contradict the testimony of both officers involved. Instead, it showed that Dooley did not place his right hand near the trigger and did not place his left hand on the rifle. Additionally, it showed that at the moment of the bullets impact Dooley's arms were crossed over his chest and the muzzle of the rifle was pointed toward the sky.

In affirming summary judgment for the officers, the Eighth Circuit stated:

When viewed in slow motion, the video of Dooley's actions could be seen as creating a genuine issue of fact whether Tharp used excessive force in light of Dooley's response to the shout of commands to drop the gun. But law enforcement officers are not afforded the opportunity of viewing in slow motion what appears to them to constitute life-threatening action. In contrast to the situation in *Scott v. Harris*, the real-time view of the video does not clearly contradict Tharp's account of what he perceived Dooley's actions to have been.

Accordingly, we must view Tharp's mistaken-perception action for objective reasonableness.

856 F.3d 1177, 1182-83 (internal citations omitted).

b. There was no law in 2018 suggesting that the conduct of Officer Jenison was plainly incompetent or in knowing violation of the law.

The legal framework concerning qualified immunity tilts decidedly in favor of dismissal. Even if this Court broke new ground by finding Officer Jenison's conduct was objectively unreasonable, he is still entitled to judgment as a matter of law because of the breathing room afforded by qualified immunity.

Suits against government actors allow those wronged by governmental misconduct a method of redress. *Anderson v. Creighton*, 483 U.S. 635, 638-639 (1987). Although such suits permit the possible vindication of a plaintiff's federal rights, non-meritorious suits exact a high cost upon both society and government officials. See *id.* The suits may unduly interfere with the discharge of governmental official's duties because of the constant threat of civil litigation and potential money damages. See *Harlow*, 457 U.S. at 814. "[T]o submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Horstkotter v. Dept. of Pub. Safety*, 159 F.3d 1265, 1277 (10th Cir., 1998) (internal quotations and citations omitted). Thus, the court has recognized that qualified immunity should be liberally applied given the important interest to a society as a whole. See *White v. Pauly*, 137 S. Ct. 548, 551-553 (2017).

To balance these competing interests, governmental officials performing discretionary duties are afforded qualified immunity shielding them from civil damages liability. See *Anderson*, 483 U.S. 638; See also *Filarsky v. Delia*, 132 S. Ct. 1657, 1667-68 (2012). Qualified immunity shields an individual government official so long as the official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable officer would have known. See *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). Whether an officer is

protected by qualified immunity turns upon the objective legal reasonableness of the official's actions considered in light of the legal rules that were clearly established at the time the official acted. See *Messerschmidt v. Millender*, 132 S. Ct. 1235, 1245 (2012).

There is a presumption in favor of qualified immunity for a public official acting in his or her individual capacity. See *Hidahl v. Gilpin Cty. Dep't of Soc. Servs.*, 938 F. 2d 1150, 1155 (10th Cir., 1991). It therefore protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986); See also *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011).

Courts use a well-settled, two-step analytical framework for analyzing claims of qualified immunity. In particular a court must determine whether a plaintiff has demonstrated both (1) that the defendant's actions violated the plaintiff's federal constitutional or statutory rights and, if so, (2) that the right was clearly established at the time the conduct occurred. See *Siegert v. Gilley*, 500 U.S. 226, 231 (1991). The rigid order-of-battle the court previously insisted upon has become more flexible, *Pearson*, 555 U.S. 236, permitting this Court the discretion to address either step first. See *Weise v. Casper*, 593 F. 3d 1163, 1167 (10th Cir., 2010).

Discerning whether the relevant legal rule was clearly established is a narrowly tailored exercise that is context specific. As the court in *Anderson* recognized, nearly every right – if viewed at a sufficiently high level of generality – is clearly established. See 483 U.S. at 639. In order to protect the institutional interest qualified immunity serves, however, more is required. See *White*, 137 S. Ct. at 552-553 (granting petition, vacating judgment and vacating 10th Cir. decision because it construed the legal rule at too high of a level); accord *Pickens v. Aldaba*, 136 S. Ct. 479 (2015). Accordingly, the precise contours of the right must have been sufficiently clear that every reasonable official in that circumstance would have understood that what he or she was doing violated that right, leaving no debate as to the lawfulness of the conduct. See *Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012); *Ashcroft*, 563 U.S. at 740 (emphasis added).

When it is debatable whether a violation has occurred the law by definition cannot be clearly established, and qualified immunity applies. See *Reichle*, 132 S. Ct. at 2096 (quoting *Wilson v. Layne*, 526 U.S. 603, 618) (1999)).

Ultimately, “existing precedent must have placed the statutory or constitutional question beyond debate.” *Redmond v. Crowther*, 882 F. 3d 927, 935 (10th Cir., 2018). The dispositive question is whether the violative nature of *particular* conduct is clearly established. *White v. Pauly*, 137 Sup. Ct. 548, 552 (2017)(emphasis added); see also *Saucier v. Katz*, 533 U.S. 194, 201 (2001). “Such specificity is especially important in the Fourth Amendment context, where the court has recognized that “[i]t is sometimes difficult for an officer to determine how the relevant legal doctrine...will apply to the factual situation the officer confronts.” *Mullenix v. Luna*, 136 Sup. Ct. 305, 308 (2015)(quoting *Saucier v. Katz*, 533 U.S. 194, 205 (2001)).

Qualified immunity applies in at least three differing circumstances. “The protection of qualified immunity applies regardless of whether the government official’s error is a mistake of law, mistake of fact or a mistake based on mixed questions of law in fact.” *Pearson*, 555 U.S. at 231 (internal quotation and citation omitted). Thus, as the Supreme Court observed in *Ashcroft*, qualified immunity gives “breathing room to make reasonable but mistaken judgments.” 563 U.S. at 743; See also *Messerschmidt*, 132 S. Ct. 1244.

As one example, law enforcement officers “can have reasonable, but mistaken, beliefs as to the facts establishing the existence of probable cause or exigent circumstances, for example, and in those situations, courts will not hold that they have violated the constitution. Yet even if a court were to hold that the officers violated the Fourth Amendment by conducting an unreasonable, warrantless search [*Anderson*, 483 U.S. 635 (1987)] still operates to grant officers immunity for reasonable mistakes as to the legality of their actions.” *Saucier*, 533 U.S. at 206.

All three apply here. First, there was no consensus of federal law in January 2018 that alerted any reasonable officer, much less every reasonable officer, that Officer Jenison’s conduct

was unlawful. With regard to those who used lethal force, there was a general statement about the perimeters of when lethal force is permissible, but no legal authority – then or now – indicating that this officer alleged conduct violated the letter or spirit of that law. Rather, the law is to the contrary. See, *City & Cty. of San Francisco v. Sheehan*, 135 Sup. Ct. 1765, 1778 (2015) (collecting cases suggesting that using deadly force against the mentally unstable is not unreasonable), *Royal v. Spragins*, 575 Fed. App. 300, 303-304 (5th Cir., 2014) (officers justified in shooting suicidal man that appeared to be pointing gun at them).

Absent a consensus of federal law indicating that this officer's conduct in similar circumstances constitutes a violation, qualified immunity applies. See *White*, 137 S. Ct. at 552; see also *Carroll v. Carman*, 135 Sup. Ct. 348, 350 (2014) (citing *Reichle v. Howards*, 132 Sup. Ct. 2088, 2094 (2012)) (implying that not even “controlling circuit precedent [may be enough to] constitute clearly established federal law”); accord *Al-Kidd*, 563 U.S. 741-42 (Dist. Ct. ipse dixit of a holding is not controlling authority in the jurisdiction, much less in the entire United States).

In fact, the consensus of federal law under similar circumstances dictates that Officer Jenison's actions were not unreasonable. Most recently, in *Clark v. Bowcutt*, 675 Fed. App. 799 (10th Cir., 2017). Deputy Bowcutt shot and killed Burkinshaw while retreating from the path of Burkinshaw's oncoming motor vehicle. Burkinshaw's mother, Clark, commenced an action under §1983 alleging, inter alia, that Bowcutt violated Burkinshaw's Fourth Amendment rights by using excessive force to stop Burkinshaw's vehicle. Bowcutt filed a dispositive motion asserting the defense of qualified immunity which was denied by the United States District Court but reversed by the Tenth Circuit on appeal.

There, Clark also made much of the purported recklessness of Deputy Bowcutt's conduct in stepping in front of Burkinshaw's Volkswagen. In rejecting this argument, the Tenth Circuit stated:

Similarly, the District Court concluded that “[i]f Bowcutt could have reasonably moved out of the way, his decision to step in front of the car and remain there when it became apparent Burkinshaw was not going to stop may be found by a jury to have been reckless and to have unnecessarily created the need to use deadly force.” [citation omitted]. However, “[t]his is tantamount to the proposition that a citizen has a Fourth Amendment right to be free of police actions contributing to the use of deadly force by the citizen.” *Wilson*, 52 F. 3d 1554. That proposition is unsupported by our precedent.

675 Fed. App. 809.

Separately, in *Brosseau v. Haugen*, 543 U.S. 194 (2004) the Supreme Court reversed the Ninth Circuit and discussed the panoply of the court’s finding that there was no Fourth Amendment violation when an officer shot a fleeing suspect who presented a risk to others. *Cole v. Bone*, supra, 1333 (holding the officer “had probable cause to believe that the truck posed an imminent threat of serious physical harm to innocent motorists as well as to the officers themselves”); *Smith v. Freland*, 954 F. 2d 343 (1992) (noting a car can be a “deadly weapon” and holding the officers decision to stop the car from possibly injuring others was reasonable).

Taken as a whole, Plaintiffs’ argument is unavailing and Officer Jenison is entitled to qualified immunity.

B. There is no viable official capacity claim against the Defendants

1. The official capacity claim against Officer Jenison is redundant

In her Complaint, Plaintiff alleges against Officer Jenison in his individual and official capacity. The claims against Jenison in his official capacity are redundant and should be dismissed because Plaintiff is also suing the City of Overland Park. *Burns v. Bd. of Cty. Commrs. of Cty. of Jackson*, 197 F. Supp. 2d 1278, 1296-97 (D. Kan. 2002). *Sims v. Unified Gov’t of Wyandotte Cty. /Kansas City, Kansas* 120 F. Supp. 2d 938-944 (D. Kan. 2000); *Moore v. Bd. of Cty. Commrs. of the Cty. of Leavenworth*, 470 F. Supp. 2d. 1237-1255 (D. Kan. 2007).

2. There is no viable official capacity claim against the City.

The Complaint asserts that the City should be held responsible for the alleged unconstitutional act of Officer Jenison. There are several reasons why such liability is impossible.

First, no municipality can be liable without an underlying constitutional violation by any of its officers. See *Camuglia v. City of Albuquerque*, 448 F. 3d 1214, 1223 (10th Cir., 2006); *Myers v. Oklahoma Bd. of Cty. Commrs.*, 151 F. 3d 131 (10th Cir., 1998). As a result, the official-capacity §1983 claim must be dismissed because there is no viable claim against Jenison. See *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986).

Second, the Complaint does not identify a proper basis upon which to impose liability. A municipality may not be held liable under 42 U.S.C. §1983 by way of respondeat superior. See *Monell v. Dep't of Social Svcs. of City of New York*, 436 U.S. 658, 691 (1978). Instead, there must be facts alleged that the governmental entity caused the constitutional deprivation through its custom or policy that was enacted or has been maintained with deliberate indifference to an almost inevitable risk of constitutional injury. See *Bd. of Cty Commrs. of Bryan Cty. v. Brown*, 520 U.S. 397, 403-04 (1997); see also *Schneider v. City of Grand Junction Police Dep't*, 717 F. 3d 760, 767 (10th Cir., 2013) (identifying the three elements of municipal liability as: (1) a policy or custom, (2) causation and (3) state of mind). Imposing liability without “rigorous” adherence to the requirement of culpability and causation and properly collapses into impermissible respondeat superior liability. *Brown*, 520 U.S. 415.

The Complaint asserts that municipal liability is proper based upon a number of theories none of which are viable. First, the Complaint alleges that “the lawfully designated policymaking body, Defendant OPPD has the power and responsibility to prevent the existence of the conduct, policies, procedures, practices and customs which violate the constitutional rights of citizens...” [Doc. 1, ¶74]. Notwithstanding the fact that OPPD is not a proper party Defendant in this litigation, even if made against the City, is insufficient. At a minimum, the Plaintiff must identify

the policy-maker and the specific actions they took that resulted in the deprivation of J.A.’s Fourth Amendment rights. A similar flaw occurred in *London v. Beaty*, 612 Fed. Appx. 910 (10th Cir., 2015) where London alleged “policymakers for the City of Tulsa, through willful blindness, caused a policy, practice, pattern and/or custom of allowing its police officers to deprive citizens of their constitutional rights.” 612 Fed. App. 914. The London Court made clear that this is insufficient and affirmed the dismissal by the District Court of London’s Fourth Amendment claims. In other words, quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) a complaint requires more than a “formulaic resuscitation of the elements of a cause of action.” *Twombly*, 550 U.S. 555.

The Complaint next asserts that municipal liability is proper based upon a failure-to-train theory. [Doc. 1, ¶72]. Although it is possible that liability can be imposed upon a municipality based upon a failure to train, those circumstances are exceedingly - and justifiably - rare. See generally *Brown*, 520 U.S. 411 (recognizing the possibility of liability theoretically exists); accord *City of Canton v. Harris*, 489 U.S. 378, 391-920 (1989) (stringent fault and causation standards are necessary to avoid unprecedented liability, as almost plaintiff can – in hindsight – point to something that should have been done differently). There are a couple reasons why the Complaint does not fall within the theoretical possibility the Court in *Canton* commented upon. For one, there are no well pleaded facts suggesting that a policymaker acted with a sufficiently culpable state of mind. Further, there is no alleged history of harm asserted such that one could infer a pattern of encounters giving rise to an inference of deliberate indifference in training. Liability for municipality requires that someone made a conscious, deliberate choice to adopt a policy almost certain to lead to the denial of constitutional rights. See generally, *Brown*, 520 U.S. 407 (“simple or even heightened negligence will not suffice”). Those facts are totally lacking here.

V. CONCLUSION

Based upon the forgoing arguments and authorities the Defendants are entitled to dismissal as a matter of law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of May, 2018, the foregoing was filed electronically with the Clerk of the District Court, and a service copy was sent via e-mail on the following:

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EXHIBIT Y

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

**SHEILA ALBERS, as Administrator
of the Estate of J.A., Deceased,**

Plaintiff,

v.

**CLAYTON JENISON and THE CITY
OF OVERLAND PARK, KANSAS,**

Defendants.

Case No. 18-2185-DDC-JPO

MEMORANDUM AND ORDER

This matter comes before the court on defendants City of Overland Park and Clayton Jenison’s Motion for Judgment on the Pleadings. Doc. 9. Plaintiff has filed a Response. Doc. 22. And defendants have filed a Reply. Doc. 29. For reasons explained below, the court grants part of the motion and denies the remainder. After identifying the governing facts, this order explains why.

I. Materials the Court Will Consider for the Motion for Judgment on the Pleadings

This lawsuit arises from the shooting of “J.A.,” a 17-year-old boy, by Overland Park Police Department (“O.P.P.D”) Officer Clayton Jenison on the evening of January 20, 2018. Before identifying the facts that govern this Motion for Judgment on the Pleadings, the court first must determine what, if any, materials offered by both parties outside of the pleadings it will consider.

When defendants filed their Motion for Judgment on the Pleadings, they also submitted a computer disc containing (1) video from a responding officer’s dash-mounted camera, which captures the shooting and includes portions of audio from dispatch, and (2) a full transcript of the

911 conversation between dispatchers and officers involved in the event (“Audio Transcript”). Doc. 10-1 at ¶¶ 3–4. Defendants’ motion explicitly relies on this video and Audio Transcript.

Plaintiff does not object to the court considering the video. *See* Doc. 22 at 7 (“. . . Plaintiff does not object to the Court considering the video, as it shows precisely what it shows and no more.”). But, plaintiff makes three arguments about what other evidence the court should consider and how the court should proceed. First, plaintiff objects to including the Audio Transcript that defendants provided because plaintiff questions the accuracy of the supporting affidavit. *See id.* at 8. Second, plaintiff asserts that if the court considers the video and/or audio transcript, Fed. R. Civ. P. 12 directs the court to convert defendants’ Motion for Judgment on the Pleadings into a motion for summary judgment. *Id.* at 8. Last, and alternatively, if the court considers the video and Audio Transcript without changing the motion to one for summary judgment, plaintiff asks the court to consider exhibits plaintiff attached to her Memorandum in Opposition to Defendants’ Motion for Judgment on the Pleadings.¹ *Id.*

A. Governing Law

Generally, at the motion to dismiss² stage, if the parties present matters outside of the pleadings for consideration, “the court must either exclude the material or treat the motion as one for summary judgment.” *Brokers’ Choice of Am., Inc. v. NBC Universal, Inc.*, 861 F.3d 1081, 1103 (10th Cir. 2017) (quoting *Alexander v. Oklahoma*, 382 F.3d 1206, 1214 (10th Cir. 2004)). But, the district court may “consider documents attached to or referenced in the

¹ Plaintiff includes six exhibits: O.P.P.D. Standard Operating Procedure 2330: Response to Resistance, (Doc. 22-1); Personnel Action Report of Clayton Jenison, (Doc. 22-2); O.P.P.D. Standard Operating Procedure 1080: Department Firearms and Less Lethal Weapons Training, (Doc. 22-3); Investigatory Reconstruction Analysis Report by Steven R. Christoffersen, P.E., (Doc. 22-4); Affidavit of Steven R. Christoffersen, P.E., (Doc. 22-5); and Résumé of Steven R. Christoffersen, P.E., (Doc. 22-6).

² Defendants have moved for judgment on the pleadings under Fed. R. Civ. P. 12(c). Courts evaluate a Rule 12(c) motion under the same standard as a Rule 12(b)(6) motion to dismiss. *See Colony Ins. Co. v. Burke*, 698 F.3d 1222, 1228 (10th Cir. 2012).

complaint if they are ‘central to the plaintiff’s claim and the parties do not dispute the documents’ authenticity.’” *Id.* (quoting *Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 941 (10th Cir. 2002)); *see also Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009) (citing *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007)); *TMJ Implants, Inc. v. Aetna, Inc.*, 498 F.3d 1175, 1180 (10th Cir. 2007); *Indus. Constructors Corp. v. U.S. Bureau of Reclamation*, 15 F.3d 963, 964–65 (10th Cir. 1994). Even when such documents exist, the court, at the motion to dismiss stage, “has broad discretion in determining whether to accept materials beyond the pleadings.” *Brokers’ Choice*, 861 F.3d at 1103 (citing *Lowe v. Town of Fairland*, 143 F.3d 1378, 1381 (10th Cir. 1998)).

B. Defendants’ Submissions

The court first addresses the video exhibit submitted by defendants. The Complaint relies extensively on photos taken from the police dashcam footage and thus, one fairly could conclude that the Complaint incorporates the video by reference. *See* Doc. 4 at 9 (Compl. ¶ 22); *id.* at 13 (Compl. ¶ 29); *id.* at 16–21. And the video is central to plaintiff’s claim—it captures the entire interaction between Officer Jenison and J.A. *See, e.g., Estate of Ronquillo by and through Estate of Sanchez v. City and Cty. of Denver*, 720 F. App’x 434, 437 (10th Cir. 2017) (considering surveillance video at motion to dismiss stage when it captured most of the events resulting in officers shooting suspect who attempted to flee in his car). Last, as noted, plaintiff does not challenge the video’s authenticity. The court thus will consider the video.

But the court will not consider the Audio Transcript because plaintiff contests Officer Kohake’s affidavit. This affidavit attests to the validity of the transcript purportedly capturing the exchange between the 911 dispatch and responding officers. *See* Doc. 22 at 7–8. Plaintiff

contends that Officer Kohake’s affidavit “contains data that cannot be verified without a deposition.” *See id.* at 8.

This issue is like one considered in *Stewart v. City of Prairie Village*, where our court declined to consider an audio recording that police offered in a 42 U.S.C § 1983 claim. 904 F. Supp. 2d 1143 (D. Kan. 2012). In *Stewart*, defendants sought to include an audio recording capturing the police’s interaction with the decedent, who police shot three times, at the motion to dismiss stage. *Id.* at 1154, 1154 n.17. The disputed recording captured the officer’s command, instructing the decedent, “don’t pick up that knife.” *Id.* at 1152. The court declined to consider the tape at the motion to dismiss stage, reasoning that “[a]lthough the recording is referred to in the Complaint, and although it addresses an issue central to Plaintiff’s claim, Plaintiff argues that she cannot know if the tape is a true and accurate record of the event without discovery.” *Id.* at 1153 n.17.

Here, plaintiff references some dispatch conversations in her Complaint. *See* Doc. 4 at 3 (Compl. ¶ 8); *id.* at 4 (Compl. ¶ 12). But, like the plaintiff in *Stewart*, plaintiff here argues that the affidavit, and in turn, the transcript require discovery to verify. *See* Doc. 22 at 8. The court thus will consider only the video—and the audio included in the video³. But the court will not consider the Audio Transcript.

C. Plaintiff’s Submissions

Finally, the court will not consider any exhibits attached to plaintiff’s Memorandum in Opposition to Defendants’ Motion for Judgment on the Pleadings. It is true, plaintiff refers to O.P.P.D. policies in her Complaint. *See* Doc. 4 at 23–24, 26 (Compl. ¶¶ 43–44, 64). But the

³ So far as the court can discern, the dispatch radio used in plaintiff’s Complaint comes from what is audible on the dashcam video provided by defendants. *See* Doc. 22 at 34.

court will not consider the policies in full at the motion to dismiss stage because they are not central to either plaintiff's excessive force or municipal liability claims.

Exercising its discretion, the court finds that the Overland Park Police Department Standard Operating Procedures are not central to plaintiff's excessive force claim. It is true that "[o]fficials sued for constitutional violations do not lose their qualified immunity merely because their conduct violated some statutory or administrative provision." *Tanberg v. Sholtis*, 401 F.3d 1151, 1160 (10th Cir. 2005) (quoting *Davis v. Scherer*, 468 U.S. 183, 194 (1984)). But, in this Circuit, courts have considered an officer's training as part of an excessive force claim. *See Weigel v. Broad*, 544 F.3d 1143, 1152 (10th Cir. 2008) (incorporating officer's training into reasonableness evaluation under Fourth Amendment). So, while relevant, violating a standard operating procedure, standing alone, will not suffice. And, plaintiff already includes relevant standard operating policy excerpts in her Complaint. *See* Doc. 4 at 23–24, 26 (Compl. ¶¶ 43–44, 64). Thus, the court cannot say that the full policies are central to plaintiff's claim, and, in its discretion, the court chooses not to consider them at this early stage in the litigation.

Second, the standard operating procedures are not central to plaintiff's municipal liability claims. In her Complaint, plaintiff does not argue that the O.P.P.D.'s written policies are constitutionally impermissible. This argument would be a non-starter: plaintiff argues that Officer Jenison's conduct was, in part, constitutionally unreasonable because he violated his department's policies. *See, e.g.*, Doc. 4 at 26 (Compl. ¶ 64). Instead, based on the court's reading of plaintiff's Complaint, she asserts that the City failed to train or supervise officers to prevent them from violating citizens' constitutional rights. This is one avenue to establish municipal liability, but it does not require the court to consider the operating procedures at this stage.

Neither will the court consider the expert report materials and Officer Jenison's Personnel Action Report that plaintiff submitted with her Memorandum in Opposition to Defendants' Motion for Judgment on the Pleadings. *See* Doc. 22-2 (Personnel Action Report of Clayton Jenison); Doc. 22-4 (Investigatory Reconstruction Analysis Report by Steven R. Christoffersen, P.E.); Doc. 22-5 (Affidavit of Steven R. Christoffersen, P.E.); Doc. 22-6 (Résumé of Steven R. Christoffersen, P.E.). As noted, one prerequisite to considering exhibits outside the pleadings at the motion to dismiss stage is that the documents must be attached to or referenced in the complaint. *Smith*, 561 F.3d 1090 at 1098. Because these documents were prepared several months *after* plaintiff filed the Complaint, plaintiff, of course, never attached these exhibits to her Complaint or otherwise incorporated them by reference.

D. Conclusion

In sum, the court will consider the video that defendants submitted with their motion. But, the court will not consider the Audio Transcript defendants provided; the standard operating procedures plaintiff submitted; or the expert witness materials plaintiff submitted. The court also declines to convert defendants' Rule 12(c) motion into a summary judgment motion. With these boundaries established, the court now turns to the facts that govern the case at this stage.

II. Facts

The following facts are taken primarily from plaintiff's Complaint (Doc. 1), accepted as true, and viewed in the light most favorable to her. *Ramirez v. Dep't of Corr.*, 222 F.3d 1238, 1240 (10th Cir. 2000) (explaining that, on a motion for judgment on the pleadings, the court must "accept the well-pleaded allegations of the complaint as true and construe them in the light most favorable to the plaintiff" (citation omitted)).

But when a complaint includes an attached exhibit, “[the exhibit’s] legal effect is to be determined by its terms rather than by the allegations of the pleader.” *Droppleman v. Horsley*, 372 F.2d 249, 250 (10th Cir. 1967) (quotations omitted); *see also Jacobsen*, 287 F.3d at 941 (“[I]n deciding a 12(b)(6) motion, the legal effect of the [attached documents] are determined by the [documents] themselves rather than by allegations in the complaint.” (citing *Droppleman*)). So, although the court accepts all well-pleaded allegations as true and draws all reasonable inferences in plaintiff’s favor, if there is a conflict between the Complaint’s allegations and the content of the attached exhibit, the exhibit controls. *See Jackson v. Alexander*, 465 F.2d 1389, 1390 (10th Cir. 1972) (“[W]e need not accept as true . . . allegations of fact that are at variance with the express terms of an instrument attached to the complaint as an exhibit and made a part thereof”); *Olpin v. Ideal Nat’l Ins. Co.*, 419 F.2d 1250, 1255 (10th Cir. 1969). Drawn from plaintiff’s Complaint and defendants’ video, the facts are as follows.

On January 20, 2018, J.A. was alone at the Albers’ family home in Johnson County, Kansas, when defendants learned from a law enforcement dispatch that J.A. had threatened to harm himself with a knife. Plaintiff alleges dispatch directed officers, including Officer Jenison, to the Albers’ house for the sole purpose of performing a welfare check on J.A.

Defendants received some information provided by dispatch en route to the Albers’ home. A first-responding officer answered the radio dispatcher as they were in route, “I’m familiar with that kid.” Before this incident on January 20, 2018, defendants knew J.A. potentially had mental health problems. But, before that evening, J.A. had never threatened suicide, attempted to commit suicide, or threatened to harm himself. From the time when the officers (including Officer Jenison) arrived at the Albers’ home until after J.A. had been killed,

no responding officer had received Crisis Intervention Training (CIT). CIT teaches officers how to deescalate and diffuse mental health situations when answering calls for service.

Two O.P.P.D. cars arrived simultaneously at the Albers' residence. The first car, driven by Officer Newlon,⁴ arrived and parked across the street, about 30 yards to the east of the Albers' home. Officer Jenison arrived in a separate patrol car and parked around the corner on Hayes Street, about 40 to 50 yards northwest of the Albers' home.

Officers Jenison and Newlon then got out of their cars, approached the house, and spoke in front of the Albers' for a few minutes. At no point did either officer knock on the Albers' door, attempt to communicate with J.A., or identify themselves as police officers. Also, the officers' patrol vehicles did not have lights or sirens activated, and the cars remained out of the normal range of sight from the Albers' home.

Officer Newlon then returned to his patrol car to retrieve his cell phone. At this point, Officer Jenison had taken a defensive stance behind a tree in the Albers' front yard, located 51 feet from the Albers' two-car garage. While Officer Newlon headed toward his patrol car, Officer Jenison moved from behind the tree toward the Albers' home. As Officer Jenison moved toward the home, the Albers' garage door began to rise. Officer Jenison un-holstered his service weapon and continued toward the garage door.

Officer Jenison did not attempt to speak to J.A. then, nor did he identify himself as a law enforcement officer. Instead, Officer Jenison watched and listened for nine seconds as the garage door rose. During that time, Officer Jenison heard the minivan's engine running and saw that the rear brake lights were on. Then, the white reverse-warning tail lights also lit up,

⁴ Plaintiff's Complaint refers to Officer Newlon as an "unidentified officer." Doc. 4 at 4–5 (Compl. ¶¶ 13–16). The court refers to him by name because the dashcam video comes from Officer Newlon's patrol car.

indicating that the minivan's driver had put it into reverse gear. The minivan then began to back out of the garage slowly. Officer Jenison was not standing in the path of the minivan.

J.A. was driving the minivan, and he began to back it out of the garage in a straight line at 2.5 miles per hour. Officer Jenison moved from his existing location toward the outer rear passenger corner of the moving minivan with his weapon drawn and aimed at the car. Officer Jenison then yelled "stop, stop, stop." Plaintiff alleges J.A. did not know Officer Jenison was present in the driveway or that Officer Jenison was a law enforcement officer before he was shot. Less than one second later, Officer Jenison fired his weapon two times at J.A. Officer Jenison stood 5.9 feet away from the outer rear passenger corner of the minivan when he fired the first shot; he stood 6.3 feet away from the outer rear passenger corner when he fired the second. Plaintiff contends that that one or both bullets struck J.A., incapacitating him and rendering him unable to control the minivan.

The minivan stopped briefly in the driveway but then appeared to speed up in reverse, making a U-turn in the open driveway/yard area of the Albers' property. After the minivan completed the U-turn, Officer Jenison stood on the passenger side of the vehicle. The minivan continued to travel in reverse at 3.5 miles per hour in a straight path directly toward the Albers' empty home. Officer Jenison remained on the passenger side of the minivan and out of its path as it traveled past him and toward the home. No other officers stood between the minivan and the Albers' residence as it traveled toward the Albers' home.

As the minivan traveled past Officer Jenison toward the home, he fired 11 more shots at J.A. After the shooting stopped, the minivan coasted in neutral across the street, where it then stopped in a neighbor's front yard.

J.A.’s autopsy report shows that Officer Jenison shot J.A. six times with police-issued hollow point bullets: once in the back of the head; once in the upper neck; once in the left shoulder; once in the right back torso; once on the top right shoulder; and once in the lower lip.

III. Legal Standard

Defendants have moved for judgment on the pleadings under Fed. R. Civ. P. 12(c). Courts evaluate a Rule 12(c) motion under the same standard as a Rule 12(b)(6) motion to dismiss. *See Colony Ins. Co. v. Burke*, 698 F.3d 1222, 1228 (10th Cir. 2012).

On a Rule 12(b)(6) motion to dismiss for failing to state a claim, the court accepts all facts pleaded by the non-moving party as true and draws any reasonable inferences in favor of the non-moving party. *Id.* “To survive a motion to dismiss [under Rule 12(b)(6)], a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* (citing *Twombly*, 550 U.S. at 556). “Under this standard, ‘the complaint must give the court reason to believe *this* plaintiff has a reasonable likelihood of mustering factual support for *these* claims.’” *Carter v. United States*, 667 F. Supp. 2d 1259, 1262 (D. Kan. 2009) (quoting *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007)).

Although this Rule “does not require ‘detailed factual allegations,’” it demands more than “[a] pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action’” which, as the Supreme Court has explained, simply “will not do.” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555). In short, the court need not “accept as true a

legal conclusion couched as a factual allegation.” *Twombly*, 550 U.S. at 557 (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)) (internal quotation omitted).

IV. Discussion

Plaintiff makes two claims, both under 42 U.S.C. § 1983. First, plaintiff asserts that Officer Jenison used excessive lethal force in violation of the Fourth Amendment. Doc. 4 at 25. Second, plaintiff asserts that the City incurs municipal liability for failing to train its officers how use appropriate force. *Id.* at 29.

A defendant is liable under § 1983 if, under color of state law, he deprives a person of a constitutional right. 42 U.S.C. § 1983. Defendants argue the court should dismiss plaintiff's § 1983 claims for two reasons. First, defendants argue that Officer Jenison is entitled to qualified immunity. Doc. 10 at 3. Second, defendants argue that the Complaint does not plead a viable official capacity claim against either Officer Jenison or the City. *Id.* at 17–18. The court addresses each defense in turn below.

A. Qualified Immunity on the Excessive Use of Force

Qualified immunity protects officers from suit when the officer's conduct does not violate clearly established statutory or constitutional rights which a reasonable person would have known. *City & Cty. of S.F. v. Sheehan*, ___ U.S. ___, 135 S. Ct. 1765, 1774 (2015). “The plaintiff bears the burden of establishing both (1) that the defendant violated a constitutional right and (2) that the right had been clearly established by the time of the violation.” *Tenorio v. Pitzer*, 802 F.3d 1160, 1164 (10th Cir. 2015). In this case, plaintiff alleges that Officer Jenison used excessive force against J.A. that violated the Fourth Amendment. Doc. 4 at 25. Defendants counter that qualified immunity shields Officer Jenison from this claim because (1) the use of

deadly force was not unreasonable, and (2) no law existed in 2018 suggesting that Officer Jenison’s conduct was plainly incompetent or in knowing violation of the law. Doc. 10 at 9, 13.

1. Constitutionally Excessive Force

A claim that law enforcement officers used excessive force to effect a seizure is governed by the Fourth Amendment’s “reasonableness” standard.⁵ *Cty. of L.A. v. Mendez*, __ U.S. __, 137 S. Ct. 1539, 1546 (2017). “Determining whether the force used to effect a particular seizure is ‘reasonable’ under the Fourth Amendment requires a careful balancing of ‘the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the countervailing governmental interests at stake.’” *Graham v. Connor*, 490 U.S. 386, 396 (1989) (quoting *Tennessee v. Garner*, 471 U.S. 1, 6 (1985)) (further citation omitted). The court must pay “careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.” *Id.* That an officer made a mistake about the need for force does not decide the question conclusively; rather, the court must analyze the situation as a reasonable officer would analyze it in the heat of the moment. *Id.* at 396–97.

A reasonable officer may use deadly force if, knowing the facts as the officer on the scene knew them, the officer “had probable cause to believe that there was a *threat of serious physical harm to [himself]* or to others.” *Estate of Larsen ex rel. Sturdivan v. Murr*, 511 F.3d

⁵ Plaintiff also alleges defendants violated J.A.’s Fourteenth Amendment rights. But for an excessive force claim “in the course of making an arrest, investigatory stop, or other ‘seizure’ of his person,” a plaintiff only can claim a Fourth Amendment violation. *Graham v. Connor*, 490 U.S. 386, 395 (1989) (“[A]ll claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other ‘seizure’ of a free citizen should be analyzed under the Fourth Amendment and its ‘reasonableness’ standard, rather than under a ‘substantive due process’ approach.”). When an officer uses excessive force to kill an individual, a seizure has occurred. *See Stewart*, 904 F. Supp. 2d at 1153. Since plaintiff’s claims arise from an officer’s alleged use of excessive force, the Fourth Amendment alone governs these claims.

1255, 1260 (10th Cir. 2008) (quoting *Sevier v. City of Lawrence*, 60 F.3d 695, 699 (10th Cir. 1995)) (internal quotations omitted). The answer to this question depends, in part, on the following factors: “(1) whether the officers ordered the suspect to drop his weapon, and the suspect’s compliance with police commands; (2) whether any hostile motions were made with the weapon towards the officers; (3) the distance separating the officers and the suspect; and (4) the manifest intentions of the suspect.” *Tenorio*, 802 F.3d at 1163 (quoting *Estate of Larsen*, 511 F.3d at 1260). And, while these four factors “are quite significant,” they are “only aids in making the ultimate determination, which is ‘whether, from the perspective of a reasonable officer on the scene, the totality of the circumstances justifies the use of force.’” *Id.* at 1164 (quoting *Estate of Larsen*, 511 F.3d at 1260).

For example, in *Tenorio*, the Circuit affirmed a district court’s decision denying summary judgment based on qualified immunity. 802 F.3d at 1166. There, three officers had responded to a 911 call where the caller reported that her sister-in-law’s husband—Mr. Tenorio—was intoxicated and holding a knife to his own throat. *Id.* at 1161. The caller worried that Mr. Tenorio would harm himself or his wife. *Id.* at 1162. When the officers responded to the call, dispatch had informed them about Mr. Tenorio, including that Mr. Tenorio had a knife to his own throat; he had acted violently in the past; and that multiple people were at home with him. *Id.* The Circuit concluded that the record could support a potential jury finding that would establish Mr. Tenorio’s excessive force claim:

[I]n particular, that Tenorio “did not ‘refuse’ to drop the knife because he was not given sufficient time to comply” with [the officer’s] order; that Tenorio made no hostile motions toward the officers but was merely “holding a small kitchen knife loosely by his thigh . . . and made no threatening gestures toward anyone.”; that Tenorio was shot “before he was within striking distance of [the officer]; and that, for all [the officer] knew, Tenorio had threatened

only himself and was not acting or speaking hostilely at the time of the shooting.[’’]

Id. at 1164–65 (citation omitted).

Similarly, in *Zia Trust Co. ex rel. Causey v. Montoya*, the Circuit affirmed a district court’s decision denying summary judgment on qualified immunity. 597 F.3d 1150, 1155 (10th Cir. 2010). It concluded a reasonable jury could find from the summary judgment facts that the officer, who was responding to a domestic dispute, had acted unreasonably because he shot a man who was backing a van down a driveway, but the van appeared to be stuck on a pile of rocks. *Id.* at 1153–55.

The Circuit applied the test as follows to *Zia Trust*’s summary judgment facts, viewed in plaintiff’s favor: First, the officer did not order the suspect to drop his weapons; instead, the officer got out of his vehicle with his weapon already drawn; proceeded to a position right in front of the suspect’s van; and did not say anything to plaintiff. *Id.* at 1154. Under the summary judgment facts in *Zia Trust*, a reasonable jury could infer that the victim did not know the officer was, in fact, a police officer. *Id.* at 1154–55. Second, the van appeared to be stuck on a pile of rocks, and that it had lurched forward less than a foot, if at all, when the victim revved the engine. *Id.* Third, the officer stood some 15 feet away from the van at the time of the shooting. *Id.* Fourth, although the officer testified that he saw the victim change gears and could see “in [the victim’s] face what he intended,” the Circuit concluded that based on distance, it was unclear whether the victim intended to harm the officer or anyone else. *Id.* Considering the factors together, the Circuit concluded that the summary judgment facts created a triable issue whether the victim intended to harm the officer or others on the scene. *Id.* at 1155.

With this guidance from *Tenorio* and *Zia Trust*, the court now applies these cases to the facts pleaded here. The first factor asks whether officers ordered J.A. “to drop his weapon[] and

[whether he complied] with police commands[.]” *Estate of Larsen*, 511 F.3d at 1260. The Complaint alleges, and the video captures, that Officer Jenison yelled “stop, stop, stop” in quick succession as the van began to roll down the driveway. Doc. 4 at 12. The van’s brake lights flashed intermittently during Officer Jenison’s commands and stopped briefly after Officer Jenison fired two shots at the van. Like the officer in *Zia Trust*, Officer Jenison approached the vehicle with his weapon already drawn and positioned himself near the van. Plaintiff also alleges, and the court must assume as true, that J.A. did not know someone was in the Albers’ driveway, or that the person was a police officer. A reasonable jury could also infer that, like *Tenorio*, J.A. did not have time to comply with Officer Jenison’s command because the first two shots occurred just seconds after Officer Jenison’s command to stop. This factor favors plaintiff, suggesting that a constitutional violation occurred because Officer Jenison failed to identify himself as a police officer and thus supports the inference that J.A. was unaware that a law enforcement officer had ordered him to stop driving.

The second factor asks whether J.A. made “any hostile motions” toward the officers “with the weapon.” *Estate of Larsen*, 511 F.3d at 1260. This factor requires the court to consider whether the minivan, in this case, could constitute a deadly weapon. It is well established in our Circuit that “if threatened by weapon (which may include a vehicle attempting to run over an officer), an officer may use deadly force.” *Clark v. Bowcutt*, 675 F. App’x 799, 806 (10th Cir. 2017) (quoting *Thomas v. Durastanti*, 607 F.3d 655, 664 (10th Cir. 2010)). But the Circuit in *Bowcutt* emphasized that the officer in that case and the officer in *Thomas* “[were] in the [vehicle’s] path in a very confined area.” *Id.* at 808 (quoting *Thomas*, 607 F.3d at 655); *see also Carabajal v. City of Cheyenne*, 847 F.3d 1203, 1210 (10th Cir. 2017) (finding that officer who fired at suspect in slow-moving car acted reasonably because officer was in “close

quarters” and suspect “had notice of police presence”); *id.* at 1211 (“[T]he video evidence here clearly shows Officer Thornton was positioned in the path of Mr. Carabajal’s vehicle as it lurched forward.”).

As the discussion of the first factor noted, the Complaint here alleges, and the video does not contradict, that J.A. was unaware of the police officer’s presence until he was shot. Doc. 4 at 14. Also, plaintiff’s Complaint pleads that Officer Jenison approached the garage, watched the garage door rise, saw the minivan reverse lights come on, and then began to move closer as the minivan backed down the driveway. *Id.* at 8–10. Officer Jenison moved toward the minivan, but he did not place himself in the van’s path before he fired the first two shots. *Id.* at 12. Nor does the video show that Officer Jenison was confined in close quarters; to the contrary, defendants appear to concede that the video shows space between Officer Jenison and the minivan. Doc. 10 at 8 (“At this point, Jenison is, generally, to the rear and right of the van.”).

The court thus holds that the second factor favors plaintiff. Taking the pleaded facts as true, a jury could find that a reasonable officer would not have concluded that J.A. was operating the minivan as a deadly weapon. Instead, when the first two shots were fired, the facts show that J.A. did not know the person yelling “stop” was a police officer; that Officer Jenison was not standing in a confined area or in the van’s direct path; and that the van slowly backed out of the garage before the officer fired the first two shots.

The third factor turns on the distance separating Officer Jenison and J.A. The Tenth Circuit never has established a bright-line rule governing this aspect of the analysis. But in *Zia Trust*, the Circuit noted that it “could not say that a van fifteen feet away [from the officer], which according to the plaintiffs was clearly stuck on a pile of rocks, gave Officer Montoya probable cause to believe that there was a threat of serious physical harm to himself or others.”

597 F.3d 1150, 1155 (2010). In this case, when Officer Jenison fired the first shot, plaintiff alleges that he stood 5.9 feet away; for the second shot, 6.3 feet away. This distance is significantly closer than the distance between the van and officer in *Zia Trust*. And, J.A.’s minivan was not immobilized by a pile of rocks or any other barrier. This factor thus favors defendants’ argument that, based on the facts alleged, J.A. posed a threat of harm to Officer Jenison or others.

The fourth factor considers “the manifest intentions of the suspect.” *Estate of Larsen*, 511 F.3d at 1260. The facts alleged establish, for present purposes, that defendants knew J.A. had mental health problems before January 20, 2018, and that 911 callers had informed police that J.A. was threatening to harm himself with a knife. Also, dispatch communications to officers establish that one officer, while in route, said “I’m familiar with that kid.” The court also must accept as true plaintiff’s allegation that Officer Jenison did not see J.A.’s face in the car, that Officer Jenison did not speak with J.A. at any point during the interaction, and that J.A. did not know the person yelling “stop, stop, stop” was a police officer.

Defendants argue that J.A. intended to harm either Officer Jenison or the public if he could escape the garage and surrounding areas. A law enforcement officer’s use of deadly force is not unreasonable if other officers or the public are threatened by a risk of harm from the vehicle. *Estate of Larsen*, 511 F.3d at 1260. Here, defendants argue, a reasonable officer in Officer Jenison’s situation would be justified to use deadly force to prevent J.A. from driving away in the minivan because the responding officers knew J.A. was suicidal. Doc. 10 at 11. That is, defendants argue, J.A. would have driven off and intentionally caused a traffic accident to commit suicide. *Id.*

But, from the facts alleged, a reasonable jury also could find that J.A. only posed a harm to himself. Just like the officers in *Tenorio*, who knew at the time of the shooting that Tenorio only had threatened to harm himself and was not acting or speaking hostilely at the time of the shooting, 802 F.3d at 1165, Officer Jenison knew that J.A. had indicated that he just wanted to harm himself with a knife. Based on these facts, a reasonable jury could conclude that deadly force was unreasonable because J.A. only posed harm to himself because J.A. never had expressed a present intention to harm others, or indicate that he planned to commit suicide by a car accident.⁶

A reasonable jury also could find, based on the video, that no other officers stood in the van's path. The video shows that Officer Jenison, as J.A. backed out of the garage, remained to the right rear side of the van. No other officer is visible until after Officer Jenison had fired the first two shots. Defendants argue that Officer Jenison's proximity to a "wildly rotating van create[d] an objective threat to him." Doc. 10 at 11. But this argument fails to differentiate between Officer Jenison's first two shots and the last 11 shots. It also misapprehends the court's role at the motion to dismiss stage. At this stage, the court asks whether a reasonable jury could conclude that the *first two shots* were an unreasonable use of deadly force based on an inference,

⁶ Defendants direct the court to several cases supporting the proposition that it is not unreasonable for officers to shoot a fleeing suspect in a vehicle when the suspect presented a risk of harm to others. See Doc. 10 at 17 (citing *Brosseau v. Haugen*, 543 U.S. 194 (2004); *Cole v. Bone*, 993 F.2d 1328 (8th Cir. 1993); *Smith v. Freland*, 954 F.2d 343 (6th Cir. 1992)). All of these cases involve a fleeing suspect, who the police had reason to believe had committed a crime and was actively avoiding capture. See *Brosseau*, 543 U.S. at 200 (referring to the officer's situation as "whether to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight"); *Cole*, 993 F.2d at 1333 (finding officer's use of deadly force reasonable to protect public and officer because officer suspected driver had committed a crime and had seen the driver "force several motorists off the road and threaten the safety of many others"); *Freeland*, 954 F.2d at 347 (reasoning that because suspect "had proven he would do almost anything to avoid capture[] [the officer] could certainly assume he would not stop at threatening others"). The facts pleaded here are quite different: Police did not suspect that J.A. had committed a crime or was on his way to commit a crime. Also, J.A. slowly backed the minivan down the driveway without knowing police were present when Officer Jenison fired the first two shots. A reasonable jury thus could find that a reasonable officer in Officer Jenison's position would not assume that J.A. posed a threat to others based on the belief that J.A. was suicidal.

as the Complaint alleges, that the first two shots incapacitated J.A. *See Cty. of L.A. v. Mendez*, ___ U.S. ___, 137 S. Ct. 1539, 1548 (2017) (explaining that “plaintiffs can—subject to qualified immunity—generally recover damages that are proximately caused by any Fourth Amendment violation.”). Thus, a reasonable jury could conclude that Officer Jenison violated J.A.’s Fourth Amendment rights and that Officer Jenison’s initial conduct proximately caused the need to fire 11 more times at the minivan. Because the court presumes plaintiff’s pleaded facts as true, and the video is consistent with these allegations, this factor favors plaintiff’s claim that Officer Jenison used unreasonable force.

Bearing in mind that these “four factors are only aids in making the ultimate determination,” *Estate of Larsen*, 511 F.3d at 1260, the court concludes from the totality of the circumstances alleged that plaintiff has stated a claim that Officer Jenison used lethal force unreasonably. The overarching reasonableness factors outlined in *Graham*—the severity of the crime; the immediate threat to the safety of officers and others, and whether the suspect is actively evading arrest by flight—further illustrate what a reasonable jury might conclude: That J.A. had committed no crime; that no officer stood in the path of the minivan; that J.A. had not threatened to hurt anyone but himself; and that J.A. was not fleeing from arrest because he did not know that a law enforcement officer was standing behind the van. The court must apply these inferences in plaintiff’s favor at the motion to dismiss stage. And so, the court thus finds that plaintiff has met her burden to plead facts capable of supporting a finding or inference of a constitutional violation.

2. Clearly Established Right

For a statutory or constitutional right to achieve “clearly established” status, the existing precedent must make the right one that is beyond debate to a reasonable officer. *Estate of*

Larsen, 511 F.3d at 1260. Also, the right at issue cannot be defined at a high level of generality; rather, the existing precedent must be “particularized to the facts of the case.” *White v. Pauly*, ___ U.S. ___, 137 S. Ct. 548, 552 (2017) (per curiam) (internal quotation marks omitted); *see also Mullenix v. Luna*, ___ U.S. ___, 136 S. Ct. 305, 308 (2015) (“The dispositive question is ‘whether the violative nature of *particular* conduct is clearly established.’”) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011)). “This inquiry ‘must be undertaken in light of the specific context of the case, not as a broad general proposition.’” *Mullenix*, 136 S. Ct. at 308 (quoting *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam)). This requirement means that the existing precedent either must involve materially similar facts or establish when the officer’s conduct obviously violates the law. *White*, 137 S. Ct. at 552. Qualifying precedent usually comes from cases decided by the Supreme Court or the Tenth Circuit, but it also can come from clearly established case law in other circuits. *Roska ex rel. Roska v. Peterson*, 328 F.3d 1230, 1248 (10th Cir. 2003). In short, “only the plainly incompetent or those who knowingly violate the law” cannot invoke qualified immunity. *Id.*

In *Mullenix*, for example, the Supreme Court rejected the Fifth Circuit’s characterization of the constitutional right at issue. *Mullenix*, 136 S. Ct. at 309. The Fifth Circuit had characterized the right plaintiff asserted there as a right to be free from “deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others.” *Id.* at 308–09 (internal quotations omitted). The Supreme Court instead construed the right claimed as the right to be free from deadly force when the officer “confronted a reportedly intoxicated fugitive, set on avoiding capture through high-speed vehicular flight, who twice during his flight had threatened to shoot police officers, and who was moments away from encountering an officer. . . .” *Id.* at 309. The Court held that no precedent clearly established this right. *Id.* at 309–10.

Plaintiff references several Circuit and Supreme Court decisions, but the most similar one is *Zia Trust*. In that case, a 2010 decision, the Tenth Circuit put officers on notice that the Constitution prohibits the use of deadly force where, under the facts alleged there, an officer shoots at a suspect in a van that was up to 15 feet away, stuck on a pile of rocks, and presenting no serious threat to officers or others. 597 F.3d 1150, 1154–55 (10th Cir. 2010). The *Zia Trust* court also quoted with approval that “[w]e do not think it requires a court decision with identical facts to establish clearly that it is unreasonable to use deadly force when the force is totally unnecessary to restrain a suspect or to protect officers, the public, or the suspect himself.” *Id.* at 1155 (quoting *Weigel v. Broad*, 544 F.3d 1143, 1154 (10th Cir. 2008)).

While not a one-to-one factual match, the distinctions between this case and *Zia Trust* only bolster a finding that the right plaintiff asserts here is a clearly established one. In *Zia Trust*, the officer had received a report that two guns were on the premises, *id.* at 1153; here, officers knew only that J.A. might have a knife at his residence, although there is no indication in plaintiff’s Complaint or the video that J.A. had the knife with him in the minivan. And instead of positioning himself in front of the van, like the officer in *Zia Trust* did, *id.* at 1155, Officer Jenison stood behind and to the right of the van driven by J.A. Thus, the inferences most favorable to plaintiff are that J.A. did not know the person yelling “stop” was a police officer and that Officer Jenison did not stand in the van’s direct path. Based on these inferences and this case’s factual similarities to *Zia Trust*, the court holds that the Complaint states a plausible claim that Officer Jenison violated clearly established law when he used deadly force against J.A.

In sum, a reasonable jury could conclude that Officer Jenison lacked probable cause to believe that J.A. posed a threat of serious physical harm to Officer Jenison or others. The court reemphasizes that, at this stage, it must accept plaintiff’s allegations as true and draw all

inferences in the light most favorable to plaintiff. On this basis, the court thus concludes, based largely on *Zia Trust*, that the law was clearly established that Officer Jenison had no right to use deadly force.

B. Official Capacity Suits

Plaintiff also asserts official-capacity claims against both Officer Jenison and the City of Overland Park. The court takes these claims in turn below.

1. Officer Jenison

Plaintiff's Complaint asserts claims against Officer Jenison in both his individual and official capacity. Doc. 4 at ¶ 2. Defendants argue that the court should dismiss the official-capacity claim against Officer Jenison because plaintiff also sued the City of Overland Park. Doc. 10 at 17; Doc. 29 at 9. The court agrees.

“The Supreme Court has recognized that ‘[t]here is no longer a need to bring official-capacity actions against local government officials [because] local government units can be sued directly for damages and injunctive or declaratory relief.’” *Moore v. Bd. of Cty. Comm’rs of Cty. of Leavenworth*, 470 F. Supp. 2d 1237, 1255 (D. Kan. 2007) (quoting *Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985)); *Stewart v. City of Prairie Village*, 904 F. Supp. 2d 1143, 1161 (D. Kan. 2012). So, official-capacity suits are simply “another way of pleading an action against an entity of which an officer is an agent.” *Monell v. Dep’t of Soc. Servs. of City of New York*, 436 U.S. 658, 691 n.55 (1978). Here, plaintiff sued both Officer Jenison and the City under 42 U.S.C. § 1983. The O.P.P.D. employed Officer Jenison at the time of the shooting. Thus, Officer Jenison served as an agent of the City of Overland Park, and an official-capacity claim against Officer Jenison is redundant. *See Sims v. Unified Gov’t of Wyandotte Cty./Kansas City*,

Kan., 120 F. Supp. 2d 938, 944 (D. Kan. 2000). The court thus dismisses plaintiff’s official capacity claim against Officer Jenison.

2. City of Overland Park

Plaintiff argues that the City of Overland Park had a policy or custom that directly caused one of the City’s agents to deprive J.A. of his constitutional rights. A municipality is liable under § 1983 only when its custom or policy directly causes a constitutional violation. *Patel v. Hall*, 849 F.3d 970, 978 (10th Cir. 2017). A plaintiff may show that a municipality has established such a policy in the following ways: (1) “a formal regulation or policy statement”; (2) an informal custom “amoun[ting] to ‘a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or usage with the force of law’”; (3) “the decisions of employees with final policymaking authority”; (4) “the ratification by such final policymakers of the decisions—and the basis for them—of subordinates to whom authority was delegated subject to these policymakers’ review and approval”; or (5) the “failure to adequately train or supervise employees, so long as that failure results from ‘deliberate indifference’ to the injuries that may be caused.” *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 602 F.3d 1175, 1189–90 (10th Cir. 2010) (first quoting *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988); then quoting *City of Canton v. Harris*, 489 U.S. 378, 388–91 (1989)) (internal quotation marks omitted).

Plaintiff does not identify any formal policy statement, nor does plaintiff provide sufficient underlying facts to show that Officer Jenison is the “final policy making authority concerning police activities” beyond that conclusory statement. *See* Doc. 4 at 2 (Compl. ¶ 2). Though plaintiff does not label her theory explicitly, the court concludes that the only possible basis for plaintiff’s municipal liability claim under Count II is a failure to train theory.

a. Failure to Train

Under Tenth Circuit precedent, a municipality is liable for failing to train its officers in the use of force only when (1) the officers exceeded the constitutional limits of force; (2) the excessive force occurred in a typical and recurring situation for police officers; (3) the city was deliberately indifferent about the need for training that would have prevented the excessive force; and (4) the lack of training directly caused the use of excessive force. *Carr v. Castle*, 337 F.3d 1221, 1228 (10th Cir. 2003).

Plaintiff here has pleaded sufficient facts to satisfy the first element because, taking her facts as true, the Complaint has established that Officer Jenison used excessive force. Plaintiff also has alleged facts sufficient to meet the second element. *See* Doc. 4 at 29–31 (Compl. ¶¶ 72, 74) (alleging that by implementing seven unconstitutional department policies or practices the City “has been and continues to be deliberately indifferent to the rights of the citizens . . . with whom the police officers of Overland Park come in contact”).

For the third requirement,

[t]he deliberate indifference standard may be satisfied when the municipality has actual or constructive notice that its action or failure to act is substantially certain to result in a constitutional violation, and it consciously or deliberately chooses to disregard the risk of harm. In most instances, notice can be established by proving the existence of a pattern of tortious conduct. In a narrow range of circumstances, however, deliberate indifference may be found absent a pattern of unconstitutional behavior if a violation of federal rights is a highly predictable or plainly obvious consequence of a municipality’s action or inaction, such as when a municipality fails to train an employee in specific skills needed to handle recurring situations, thus presenting an obvious potential for constitutional violations.

Carr, 337 F.3d at 1229 (citing *Barney v. Pulsipher*, 143 F.3d 1299, 1307–08 (10th Cir. 1998)) (internal quotation marks and citations omitted). And, “[e]ven where the City’s ‘policy is not

unconstitutional, a single incident of excessive force can establish the existence of an inadequate training program if there is some other evidence of the program's inadequacy.'" *Id.* (citing *Brown v. Gray*, 227 F.3d 1278, 1286 (10th Cir. 2000)).

In this case, plaintiff seeks to establish a failure to train theory against the City based on the following: an alleged City practice of using excessive force, including deadly force, without regard for the need for such force; an alleged City practice of failing to act on or adequately punish an officer's use of excessive force; an alleged City practice of failing to train officers properly about how to approach slow-moving vehicles safely; and an alleged City practice of failing to train officers fully or properly about how to respond to a crisis intervention call for service.⁷

⁷ Defendants argue that plaintiff does not allege facts sufficient to show that the City caused the alleged deprivation of J.A.'s constitutional rights. Doc. 10 at 19. On one side, the Supreme Court in *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), directs that a "'formulaic recitation of the elements'" without any factual allegation will not save plaintiff's Complaint from a motion to dismiss. *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555)). But in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993), the Supreme Court rejected a heightened pleading standard for § 1983 claims against municipalities, holding that "all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Id.* at 168 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

The courts, in the post-*Twombly* and *Iqbal* world, often have grappled with the governing pleading standard for § 1983 municipal liability claims. The trend in our court is to permit plaintiffs alleging municipal liability to offer minimal factual allegations when plaintiff would not normally have access to internal policies or training procedures before discovery. See *Taylor v. RED Dev., LLC*, No. 11-2178-JWL, 2011 WL 3880881 (D. Kan. Aug. 31, 2011) (citing *Thomas v. City of Galveston*, 800 F. Supp. 2d 826, 842–43 (S.D. Tex. 2011)); see also *Brantley v. Dickens*, No. 16-CV-02124-JAR-KGS, 2016 WL 6138137, at *2 (D. Kan. Oct. 21, 2016) ("To reconcile *Leatherman* with *Twombly* and *Iqbal*, the Court follows the framework adopted by Judge Lungstrum in *Taylor v. RED Development, LLC*"). Such allegations must provide fair notice to the defendant and do more than merely recite the municipal liability elements:

Allegations that provide such notice could include, but are not limited to, past incidents of misconduct to others, multiple harms that occurred to the plaintiff himself, misconduct that occurred in the open, the involvement of multiple officials in the misconduct, or the specific topic of the challenged policy or training inadequacy. Those types of details, or any other minimal elaboration a plaintiff can provide, help to 'satisfy the requirement of providing not only "fair notice" of the nature of the claim, but also "grounds" on which the claim rests,' and also to "permit the court to infer more than the mere possibility of misconduct."

And, plaintiff alleges the City's deliberate indifference to constitutional violations could have resulted from these alleged failures. Doc. 4 at 31 (Compl. ¶ 74). If proven, these facts would show that the City had actual or constructive notice that its failure to train or supervise its officers was likely to produce constitutional violations and that the City consciously chose to disregard those harms.

Last, the fourth element requires that "for liability to attach in a failure to train case, the identified deficiency in a city's training program must be closely related to the ultimate injury, so that it actually caused the constitutional violation." *Carr*, 337 F.3d at 1229 (citing *Brown*, 227 F.3d at 1290 (internal quotation marks and citations omitted)). Plaintiff does allege that the inadequate training and supervision directly caused the violations of J.A.'s rights. Doc. 4 at 31 (Compl. ¶ 74). And the harm to J.A. is the exact type of harm that one plausibly would expect the City's alleged failures to cause. Plaintiff has satisfied the fourth pleading requirement, alleging causation. The court thus concludes that plaintiff has pleaded adequate grounds for municipal liability under a failure to train theory.

V. Conclusion

For the reasons explained above, the court grants in part and denies in part defendants' Motion for Judgment on the Pleadings. The court grants defendants' motion and dismisses plaintiff's official capacity claim against Officer Jenison. Otherwise, the court denies defendants' motion.

Thomas, 800 F. Supp. 2d at 843–44 (first quoting *Twombly*, 550 U.S. at 555 n.3; then quoting *Iqbal*, 556 U.S. at 679). Defendants rely on *London v. Beaty*, 612 F. App'x 910 (10th Cir. 2015). There, the Tenth Circuit's unpublished decision affirmed a motion to dismiss plaintiff's municipal liability claim where plaintiff alleged "policymakers for the City of Tulsa, through willful blindness, caused a policy, practice, pattern and/or custom of allowing its police officers to deprive citizens of their constitutional rights." *Id.* at 914. *London* differs from the facts alleged here because plaintiff's pleading identifies the specific nature of inadequate training that caused J.A.'s alleged constitutional deprivation.

IT IS THEREFORE ORDERED BY THE COURT THAT the defendants' Motion for Judgment on the Pleadings (Doc. 9) is granted in part and denied in part.

IT IS SO ORDERED.

Dated this 26th day of October, 2018, at Kansas City, Kansas.

s/ Daniel D. Crabtree
Daniel D. Crabtree
United States District Judge



OVERLAND PARK POLICE DEPARTMENT STANDARD OPERATING PROCEDURE

NUMBER: 2330
 TOPIC: RESPONSE TO RESISTANCE
 EFFECTIVE DATE: 01/11/2019
 SUPERCEDES: 03/23/2018

SIGNATURE: /s/ Frank Donchez /s/ Santa Wilburn
 Chief of Police Bureau Commander

- I. PURPOSE
- II. LEGAL AUTHORITY TO CARRY/USE WEAPON
- III. DEFINITIONS
- IV. PROCEDURE
 - A. NON DEADLY FORCE AND TECHNIQUES
 - B. DEADLY FORCE
 - C. REPORTING REQUIREMENTS
 - D. REVIEWING REPORTS
 - E. FIREARMS DISCHARGE OR USE OF DEADLY FORCE
- ATTACHMENT A
- ATTACHMENT B

CALEA references: See below

I. PURPOSE

The value of human life in our society is immeasurable. Police officers have been delegated the responsibility to protect life and property and to apprehend criminal offenders. The apprehension of criminal offenders and the duty to protect property and the responsibility to control and process persons in custody must at all times be subservient to the duty to protect life. An officer's responsibility for protecting life includes protecting his or her own life.

The purpose of this procedure is to protect the sanctity of human life while effectively enforcing the law, and it encompasses federal and state law on the subject of use of deadly force.

This procedure applies to all OPPD employees all commissioned OP Court Security officers, and all OPFD Fire Investigators certified by the Kansas State Fire Marshall. Unless otherwise identified herein, these individuals will collectively be referred to as "officers."

The Chief of Police, the Presiding Judge and the Fire Chief will ensure those officers under their respective authority and supervision will comply with the provisions of this procedure. Further, the Presiding Judge and Fire Chief will provide the Chief of Police with written verification that all officers under their supervision are complying with the provisions of this procedure, to include, but not be limited to training, conduct, supervision, and review of violations.

Legal duties and responsibilities are imposed upon officers as a means to maintain order in the City and society as a whole. Professional performance of these duties and responsibilities requires reasonable and impartial enforcement of laws and the protection of the legal rights of

all persons. When performing their official duties, it may be necessary for officers to respond to the resistance of a person by exerting force and control over citizens to protect life, to protect property, to affect arrests, to execute court orders, or to perform other lawful duties.

It is the Department's policy for officers, when performing their official duties, to only use the degree of control or force reasonably necessary to accomplish their lawful objectives, and officers will never use force which is excessive. Under this policy, an officer's response to resistance is deemed to be reasonably necessary when it reasonably appears they cannot safely accomplish their lawful objectives by use of a lesser level of force. 4.1.1

II. LEGAL AUTHORITY TO CARRY/USE WEAPONS

Kansas law enforcement officers, to include Overland Park Police Officers, derive their power to respond to resistance from a number of state laws; however, K.S.A. 21-5227 clearly defines the authority to carry and use weapons while performing their duties.

III. DEFINITIONS

Active Resistance: Resistance which is physical but not assaultive or threatening in nature. Examples would include clinging to objects, pulling away or running away.

AFID: Anti-Felon Identification tags located within the department issued air cartridges.

Aggressive Resistance: Resisting an officer in the lawful performance of his/her duty by threatening or assaultive behavior toward the officer or others.

Conducted Electrical Weapon (CEW): A non-lethal device issued by the Department, used to incapacitate an individual by discharging an electronic current causing Electro-Muscular Disruption (EMD) or to invoke a pain compliance response by discharging an electronic current to a localized area.

Custodial: defined as a person(s) who is under arrest, in police protective custody, or being involuntarily committed.

Conducted Electrical Weapon Cycle: One trigger press and release with a five (5) second deployment in either "Drive Stun" or "Probe" mode.

Excessive Force: Force that is greater than reasonably necessary.

"Felony Involving Great Bodily Harm": Is a felony involving actual or threatened infliction of Great Bodily Harm.

Great Bodily Harm: Injury that creates a substantial risk of death or causes serious permanent disfigurement, or results in long term loss or impairment of the functioning of any bodily member or organ. The term "Great Bodily Harm" is synonymous with terms Serious Bodily Injury, Great Bodily Injury, Serious Physical Injury, and Serious Physical Harm.

Deadly Force: Force which causes death or great bodily injury or which creates a degree of risk a reasonable person would consider likely to cause death or great bodily injury and will be synonymous with Deadly Force.

Medical Only: Resistance which is physical and related to a medical condition only and not related to any type of arrest. The subject does not have the inherent ability to control their physical actions due to a medical condition.

Non-Deadly Force: Force not intended to cause death or Great Bodily Harm.

Non-Resistance: When no resistance occurs and precautionary force and verbal directions are given to seek compliance from a person to safely accomplish a lawful objective.

Officer-Involved Shooting: The intentional or unintentional discharge of a firearm by an officer, either as a participant or victim, in which a person is injured or killed, or the potential exists for criminal charges to be filed as a result of the discharge, such as aggravated assault. This would include shooting incidents that occur while an officer is Off-Duty.

Passive Resistance: Non-compliance with a lawful order of an officer including the person who remains limp, utilizes their own dead weight, remains in a prone position, or who expresses mere verbal disagreement not threatening to an officer or others.

Physical Control Methods: use of pain compliance techniques, joint or wrist locks, escort techniques, muscling/wrestling and pulling/pushing.

Police Service Dog (PSD): PSD engagement is defined as a bite.

Precautionary Force or Show of Force: Exhibiting or pointing a firearm, OC spray, ASP baton, extended range impact weapon, CEW to include the use of the "red dot", or the use of a police canine, while giving verbal directions and seeking compliance from a person to safely accomplish a lawful objective.

Reasonably Necessary Force: Force an officer reasonably believes to be necessary to safely accomplish a lawful objective. It may only be used to the extent reasonably necessary in light of the circumstances confronting the officer. Reasonableness is determined by the officer's view of the facts and circumstances based on their personal observations or facts and circumstances using reliable information, which would lead the officer to believe that a lesser degree of force would not safely accomplish the lawful objective.

Restraining Force: Is force which is necessary to overcome a person's resistance to lawful arrest or to perform any other official duty.

Spark Test: A non-contact demonstration of the CEW's ability to discharge electricity. This is conducted only when the cartridge has been removed from the device.

"Use of a Deadly Weapon": Is the actual or threatened use of a deadly weapon.

WRAP: is considered a safe restraint system designed to prevent death or injuries.

IV. PROCEDURE 4.1.4

A. NON-DEADLY FORCE

The amount and level of non-deadly force used must be reasonable. A determination of reasonableness should be based on an assessment of the factors present, including but not

limited to:

- The seriousness and nature of the offense
- The suspect's physical ability, mental competence and degree of resistance or violence toward the officer or others.
- Is physical control of a person is immediately necessary
- Can the situation be defused and handled without force
- Will the use of force escalate violence or create unreasonable risk of injury to the officer or other persons.

Non-deadly force may be used to:

- Protect the officer or another person from bodily harm
- Prevent persons from injuring themselves
- Effect and safely maintain lawful investigative stops, arrests and searches
- Overcome resistance to such stops; arrests or searches; and, to prevent escapes from custody
- Provide necessary control over persons in custody

Non-Deadly Force Techniques

Departmentally trained and authorized non-deadly force techniques are:

- Conducted Electrical Weapon (CEW)
- Oleoresin Capsicum (OC) Spray & powder
- Physical Control Methods – as defined
- (PPCT) defensive counter strikes
- Krav Maga
- ASP Baton
- Noise Flash Diversion Devices (NFDD)
- Engagement of a Police Service Dog
- Extended range impact weapon

Conducted Electrical Weapon (CEW)

The CEW will be carried in an approved holster on the officer's support side only, in "probe mode." Only Department approved and issued air cartridges will be used in the CEW. Only officers who have completed the annual departmentally approved training will be issued and allowed to use a CEW.

The CEW will not be used in potentially flammable or explosive environments; i.e. after an alcohol based OC spray exposure. Officer(s) will not use the CEW on a prisoner in a departmentally approved restraint device, unless he/she is an immediate threat to themselves or others.

The CEW will only be used to:

- Protect the officer or another person from bodily harm
- Prevent a person from injuring him or herself
- Overcoming aggressive resistance to lawful investigative stops, arrests or searches
- Stop a vicious animal that presents a danger to the officer or public.

If practicable and does not put others at risk, officers should warn the person and other officers at the scene of the intended use of the CEW. No more than one officer at a time should intentionally activate a CEW against a person.

Officer(s) will evaluate a person's compliance after each CEW activation against him/her prior to additional activations. Officer(s) will not exceed combined activations of three (3) cycles in either "probe" or "drive stun" modes.

Officers are cautioned that there may be limitations on the effectiveness of the CEW and be prepared to transition to a different force option.

Pre-Deployment Procedure

Officers will conduct a daily "spark test" prior to the start of his/her work assignment to verify proper device operation. No additional "spark test" will be conducted without supervisory approval. Officers should conduct the "spark test" in front of his/her patrol car, weather permitting, during the initial vehicle video equipment check.

Post Deployment Procedures

It will be the officer's responsibility to ensure all post-deployment procedures are completed. Officers will monitor the affected person for breathing irregularities, level of consciousness and compliance. The person will be taken to the hospital. If officers reasonably believe the person upon whom the CEW was used exhibits any sign of medical distress, or is in need of medical treatment, aid will be rendered and emergency medical personnel will be called to the scene.
4.1.5

The person's medical condition will determine whether he/she will be transported by ambulance or by an officer to a medical facility.

Officer(s) will not refuse medical treatment for anyone who requests it.

A medical release form by the hospital is not required to lodge in the county jail as long as the information is verbally passed onto the county jail.

If the CEW is deployed by an Overland Park Court security officer he/she will contact OPPD Dispatch and request a police officer and police supervisor respond to the scene.

Oleoresin Capsicum (OC) Spray

If an officer is confronted by a person brandishing OC, MACE, CN, CS spray, etc. the officer will consider the totality of circumstances and use a level of force reasonably necessary to accomplish lawful objectives. Deadly Force can only be used in accordance with this policy.

If practicable, officers should warn the person and other officers of the intended use of the OC spray. Officers need to be aware there may be limitations on the effectiveness of OC and be prepared to transition to a different force option.

OC will not be used on a person who shows "passive resistance" to an officer or in the following situations:

- In a setting where panic could reasonably result
- When a risk of unreasonable injury to the person is created, such as temporarily blinding a person walking near oncoming traffic.

- On a prisoner in a departmentally approved restraint device, unless they pose an immediate threat to themselves or others.

Post Deployment Procedures

Officers will frequently check the exposed person for indications of medical problems, until the person is released from the officer's custody. Officers will call for emergency medical assistance if any of the following is observed:

- Any unusual breathing difficulty
- Persistent gagging
- Loss of consciousness
- Profuse sweating
- Any other indication the person is in need of immediate medical care
- If the person requests medical assistance
- If the officer believes the affected person ingested OC spray into their mouth. 4.1.5

Officers will not refuse medical treatment for anyone who requests it.

Officer(s) will make notification verbally and in writing using the *Release Form Attachment A* when the exposed person is released to another law enforcement agency or other responsible person. If the arrested person is to be incarcerated in a facility, like the county jail, the officer will make verbal notification and present written authorization that the person may be incarcerated.

Additional Non-Deadly Use Of Force Techniques

Physical control methods, PPCT, Krav Maga, the ASP baton and Noise Flash Diversion Devices (NFDD) are authorized as non-deadly use of force by officers who have received departmental training in such tactics. The techniques must be used pursuant to the training standards and in compliance with this policy. Appropriate aid must be rendered to those that are injured from the use of these techniques. 4.1.5

Only Department-issued and approved defensive instruments may be carried. Officers using instruments must have received Department-approved training and qualification, unless use of other tactics and/or instruments is reasonably necessary to protect the officer or third person from imminent injury or death.

A police service dog (PSD) engagement is considered a non-deadly use of force.

"Hog-Tying": or any technique requiring the connecting of feet and hands while the hands are behind a person's back is specifically prohibited.

Extended Range Impact Weapon

The extended range impact weapon is a shotgun and discharges non deadly munitions. It is intended to incapacitate an individual for a brief time in order for the person to be safely taken into custody or to prevent the person from causing great bodily harm to himself/herself or others.

Only departmentally-approved issued weapons and ammunition will be used, and only by trained or authorized officers, who have demonstrated proficiency in the use of the weapon.

Use of the extended range impact weapon will be applied according to the manufacturer's instructions and in conformity with training provided by the Department.

The extended range impact weapon may be used when it is objectively reasonable to:

- Control a person who is armed with a deadly weapon and is threatening suicide.
- Control a person who is about to commit suicide or inflict serious bodily injury upon himself. Disarm or disable a subject who is armed with a deadly weapon and is engaging in illegal or dangerous behavior.
- Prevent injuries to police or citizens or to prevent large-scale property destruction in crowd control or riot conditions.
- Control a violent subject or a subject threatening imminent violence.

Post Deployment Procedures

Once the scene is secured, persons who have been subjected to an extended range impact weapon will be transported to the nearest medical facility as soon as practical. Officers will monitor the affected person for breathing irregularities, level of consciousness and compliance. The person's medical condition will determine whether they are transported by ambulance or by an officer to the medical facility.

B. USE OF DEADLY FORCE 4.1.2

An officer may use deadly force only when the officer reasonably believes that the action is in defense of any human life in imminent danger of death or serious bodily injury.

Justification for the use of deadly force will be limited to the facts and circumstances known or perceived by the officer at the time the decision is made. Facts unknown to the officer will not be considered in later determinations.

Deadly force will be used only for the purpose of incapacitating a suspect. When using a firearm, officers will shoot at center-body mass for maximum incapacitating effectiveness and minimized danger to others. An officer may shoot at other than center-body mass if tactical considerations such as the taking of a hostage dictate otherwise, and it is necessary to protect the officer or others from serious bodily injury or death.

Prohibited Use of Deadly Force

Officers will not:

- Use deadly force to effect the arrest or prevent the escape of an unarmed, non-dangerous, fleeing felon.
- Discharge a firearm when it appears likely an innocent person may be injured, unless such discharge is immediately necessary to protect the officer or other person from imminent death or great bodily harm.
- Discharge a firearm at or from a moving vehicle except in self defense or defense of another and when the suspect is using deadly force by a means other than the vehicle unless; a reasonable officer could infer the vehicle is operated in a manner deliberately intended to strike an officer or citizen and all other reasonable means of defense (including moving out of the path of the vehicle), have been exhausted, are not practical or are not present; and the safety of innocent persons would not be unduly jeopardized by the employee's action.
- Fire warning shots. 4.1.3

C. ADMINISTRATIVE REPORTING REQUIREMENTS 4.2.1 (B)(C)(D)

The following on-duty incidents will require a Response to Resistance administrative investigative report "Long Form":

- Deadly force
- Use of extended range impact weapon
- Use of defensive instruments (Baton, OC, CEW)
- Use of PPCT defensive counter strikes or Krav Maga
- Any employee action or application of force involving death, injury or claim of injury

**Supervisors involved in the above situations will not handle the RTR administrative investigative report. Their supervisor or another field supervisor will handle the administrative investigation.*

The incidents below require a RTR administrative "Short Form" report:

- Physical Control Methods – as defined
- Precautionary or show of force with firearm, defensive instrument or use of police service dog.

Supervisor Duties

Supervisors will respond to the scene if the incident involves:

- Deadly force
- Use of extended range impact weapon
- Use of defensive instrument (Baton, OC, CEW, engagement of PSD)
- Use of PPCT defensive counter-strikes or Krav Maga
- Injury or claim of injury

Supervisors of TFOs will communicate with the TFO to determine if a response to the scene is necessary.

- Complete an administrative investigative RTR report (short or long form)
- Conduct a thorough investigation
- Download data, ensure AFID collection and proper packaging in the event of an ECD deployment
- Communicate to the Division Commander any policy concerns created by the response to resistance incident.

D. REVIEWING REPORTS 4.2.2, 4.2.3

The response to resistance "long form" report will be forwarded through the Chain of Command to the Division Commander as soon as possible. Certain circumstances may dictate a shorter or extended deadline for completion as determined by the section manager or shift Watch Commander.

The section manager or shift Watch Commander will review the response to resistance incident and all related reports to determine if the incident was in compliance with policy. If it is determined to be within policy, the RTR will be closed within 30 days of the incident.

Any violations of policy will require a documented recommendation of discipline to be reviewed by the member's section manager or shift Watch Commander. Recommended

discipline that includes suspensions must be reviewed by the Division Commander. Outside of special circumstances, determined by the Division Commander, recommended discipline will be reviewed and served within 14 days of the incident's date.

The Chief of Police, or designee, will place any employee, whose action(s) or use of force in an official capacity results in death or serious physical injury on paid, administrative leave or assign him/her to other administrative duties pending an administrative review. If the employee is placed on administrative leave, the Chief of Police or designee should assign a Department representative to check the employee's welfare daily and identify any needed assistance or resources.

Early Warning Intervention

Early warning reports will be evaluated by the Internal Affairs Section, concerns will be forwarded to the officer's chain of command for review.

E. FIREARMS DISCHARGE OR USE OF DEADLY FORCE 1.3.6(A), 4.2.1(A)

The following procedures will be implemented when an officer uses deadly force which injures a person, or when an officer discharges a firearm for other than target practice, hunting, ballistics examinations or destroying an animal.

After an officer uses deadly force or discharges a firearm either intentionally or unintentionally, when the situation permits and there is a reasonable belief it is safe to do so, the officer will:

- Check the physical condition of any injured person, render first aid when appropriate and request necessary emergency medical aid. 4.1.5
- Report the incident to a supervisor
- Notify police dispatchers about the incident and location
- Protect his/her weapon for later examination. Do not load or unload the weapon used in the discharge and surrender said weapon to an appropriate Investigator.
- Prepare a detailed report of the incident as directed by a supervisor or an OISIT. Remain available at all times for official interviews and statements regarding the case.

Upon notification of a firearms discharge, or potential officer involved shooting, dispatchers will send medical aid to the scene and notify the Watch Commander, or designee of the incident. Dispatchers will make other notifications as directed by the Watch Commander, or designee.

Upon notification of a firearm discharge, or a potential officer involved shooting, the Watch Commander, or a designee, will:

- Ensure the scene is secured and protected.
- Notify the Division Commander, ensure the Chief of Police and appropriate Bureau Commanders are notified.

The Chief of Police or Bureau Commander will assign the Division Commanders to take charge of and conduct a preliminary investigation of the incident.

In situations involving personal injuries or possible criminal charges, the Division Commander will consult with the Chief of Police or appropriate Bureau Commander to determine the need to activate the JO CO DA's OISIT.

Board of Review

The purpose of the board of review is to aid continuing evaluation of policy, procedure and training.

A board of review will not be convened until the District Attorney is presented with a pending criminal file and determines no charges will be filed or rules there is no criminal liability; or until the internal administrative investigation has been completed.

Issue and Training of Written Directive 4.3.4

Prior to being authorized to carry lethal and less lethal weapons, all Members are required to read, review and receive instruction on the most current version of this written directive, SOP 2330, Response to Resistance which is stored in the Department's electronic, written directive's system.

After reading, reviewing and receiving instruction, Members are required to electronically sign acknowledgement of receipt and instruction of this written directive. All OPPD written directives are loaded into the electronic written directives system, and electronic signatures are tracked and maintained in the same system. Members are encouraged to frequently review this written directive either on the written directives system, or may print a copy.

Origin Date: 01/18/2008
Revision Date: 08/04/2008
Revision Date: 09/09/2009
Revision Date: 03/31/2014
Revision Date: 08/31/2016
Revision Date: 01/11/2019

CALEA references:

4.1.1
4.1.2
4.1.3
4.1.4
4.1.5
4.2.1(A)(B)(C)(D)
4.2.2
4.3.4
4.2.3

THIS INFORMATION IS RESTRICTED AS TO USE AND DISSEMINATION
CIVIL AND CRIMINAL PENAL TIES EXIST FOR MISUSE
COMPLETENESS AND ACCURACY EXPIRES IN 90 DAYS
Copied to: Mark Schmid
OPPD #918
KORA Request
2/19/2019 8:51 AM

Case Number: _____

OVERLAND PARK POLICE DEPARTMENT
SIGNATURE PAGE ATTACHMENT**Medical Information and Consent**

1. Are you presently ill or injured? ____ If so, state the nature of illness(es)/injury (ies) _____.
2. Are you taking medication? _____. If so, list the medication(s) and the prescribing doctor's name(s):

3. When and why were you last treated or seen by a doctor?

I understand that emergency medical and dental treatment is available while I am being detained by the Overland Park Police Department. If I should require emergency treatment, I hereby consent to such treatment at a medical facility designated by the City of Overland Park.

Consenting Person's Signature: _____ Printed Name: _____

Witnessing Officer's Signature: _____

Custody Release Form

I hereby assume responsibility for _____ and agree to transport him/her directly home.

☐ _____ has been exposed to an Electronic Control Device.

Receiving Person's Signature: _____ Date: _____

Receiving Person's Printed Name: _____ Telephone No: _____

Address: _____ Witnessing Officer's Signature: _____

Health Hazards for OC Spray

Signs & Symptoms of Exposure: Ingredients cause irritation through all routes of entry. Repeated contact may cause Dermatitis. Ingestion may cause nausea, vomiting and/or diarrhea.

Medical Conditions Generally Aggravated by Exposure: May cause more severe, temporary, effects on those persons who are asthmatics or suffer from emphysema.

Emergency and First Aid Procedures: Provide fresh air, irrigate with copious amounts of cool water. Obtain medical advice if symptoms persist.

Routes of Entry:

1. *Inhalation* - Provide fresh air.
2. *Eyes* - Irrigate with cool water at least 15 minutes, or until relieved.
3. *Skin* - Flush with cool water. Wash with mild soap and water.
4. *Ingestion* - Rinse with water. Ingest milk or water. Obtain medical advice immediately.

Case Number: _____

Person Exposed to OC Spray: _____

OVERLAND PARK POLICE DEPARTMENT
SIGNATURE PAGE ATTACHMENT

Vehicle Liability and Tow Waiver

Vehicle Description: Color: _____ Year: _____ Make: _____ Model: _____ Style: _____

License Number: _____ State: _____ Year: _____

Vehicle Condition: _____ Vehicle Location: _____

The above-described vehicle has been left at the above-listed location with my permission. By signing this form, I am releasing the City of Overland Park, Kansas, its Officers and employees from any and all claims of liability, including, but not limited to, theft or damage to the above-listed vehicle and/or any contents contained therein.

Signature: _____ Date: _____

Witnessing Officer's Signature: _____

Missing Persons Attachment

Missing Person's Name: _____

Reporting Person's Name: _____

My signature verifies I have reported the above-listed person as a missing person to the Overland Park Police Department

Reporting Person's Signature: _____

THIS INFORMATION IS RESTRICTED AS TO USE AND DISSEMINATION.
CIVIL AND CRIMINAL PENALTIES EXIST FOR MISUSE.
COMPLETENESS AND ACCURACY EXPIRES IN 90 DAYS.
Copied to: Mex Schindler
KORA Request
2/19/2019 8:51 AM

SUPERVISOR GUIDELINES FOR AIM REPORTING

RESPONSE TO RESISTANCE (SHORT FORM):

- Only used for Precautionary Force and Physical Control Incidents
- Complete all applicable windows (check boxes)
- Enter the names and information of the involved officer(s), individual(s) and witnesses, if available or known
- No narrative is required for the Response to Resistance Short Form
- Attach I/Leads PDF report/or TFO memo.
- No other attachments are required (i.e. witness statements, recordings etc.)

Tracking:

- When finished, the supervisor will check the appropriate box for their recommendation.
- The supervisor will track the response to resistance report to the supervisor's section manager or shift Watch Commander within three days.
- If a policy violation is noted follow the investigative and tracking guidelines of the Long form.

RESPONSE TO RESISTANCE (LONG FORM):

- Use for all other Response to Resistance incidents
- Complete all applicable windows
- Enter the names and personal data of those involved officer(s), individuals and witnesses, if available or known
- Include one summary of the investigation/incident under the notes section.

Summarize (within the notes section):

- Core transaction
- A summary description of what each officer did during the response to resistance. (It is not necessary to document a summary under each officer's individual note section.)
- Audio and video availability along with the times in order to assist with the review
- Note of verbal or written witness statements
- Supervisor opinion of policy compliance

Exhibits:

- Attach PDF I/Leads report
- Attach available witness statements to the AIM report not Share Point

Tracking:

- When finished, the supervisor will check the appropriate box for their recommendation and track the report.
- The supervisor will track the response to resistance report to the supervisor's section manager or shift Watch Commander within three days. (Although certain circumstances may dictate a shorter deadline for completion as determined by the section manager or shift Watch Commander.).
- If the supervisor's section manager or shift Watch Commander is on extended leave, track the report to the on duty section manager or shift Watch Commander.
- Within five scheduled working days the section manager or shift Watch Commander will review the response to resistance incident and all related reports to determine if the incident was in compliance with policy.

"No Policy Violation" - The response to resistance will be closed.

"Policy Violation" - Any violations of policy will require a documented recommendation of discipline to be reviewed by the member's section manager or shift Watch Commander.

Recommended discipline. Outside of special circumstances, determined by the Division Commander, recommended discipline will be reviewed and served within 14 days of the incident's date.



OVERLAND PARK POLICE DEPARTMENT STANDARD OPERATING PROCEDURE

EXHIBIT AA

NUMBER: 2330
TOPIC: RESPONSE TO RESISTANCE
EFFECTIVE DATE: 03/23/2018
SUPERCEDES: 08/31/2016

SIGNATURE: /s/ Frank Donchez /s/ Simon Happer
Chief of Police Bureau Commander

- I. PURPOSE**
 - II. LEGAL AUTHORITY TO CARRY/USE WEAPON**
 - III. DEFINITIONS**
 - IV. PROCEDURE**
 - A. NON DEADLY FORCE AND TECHNIQUES
 - B. DEADLY FORCE
 - C. REPORTING REQUIREMENTS
 - D. REVIEWING REPORTS
 - E. FIREARMS DISCHARGE OR USE OF DEADLY FORCE
- [ATTACHMENT A](#)
[ATTACHMENT B](#)

CALEA references: See below

I. PURPOSE

The value of human life in our society is immeasurable. Police officers have been delegated the responsibility to protect life and property and to apprehend criminal offenders. The apprehension of criminal offenders and the duty to protect property and the responsibility to control and process persons in custody must at all times be subservient to the duty to protect life. An officer's responsibility for protecting life includes protecting his or her own life.

The purpose of this procedure is to protect the sanctity of human life while effectively enforcing the law, and it encompasses federal and state law on the subject of use of deadly force.

This procedure applies to all OPPD commissioned Law Enforcement Officers, all commissioned OP Court Security officers, and all OPFD Fire Investigators certified by the Kansas State Fire Marshall. Unless otherwise identified herein, these individuals will collectively be referred to as "officers."

The Chief of Police, the Presiding Judge and the Fire Chief will ensure those officers under their respective authority and supervision will comply with the provisions of this procedure. Further, the Presiding Judge and Fire Chief will provide the Chief of Police with written verification that all officers under their supervision are complying with the provisions of this procedure, to include, but not be limited to training, conduct, supervision, and review of violations.

Legal duties and responsibilities are imposed upon officers as a means to maintain order in the City and society as a whole. Professional performance of these duties and responsibilities requires reasonable and impartial enforcement of laws and the protection of the legal rights of all persons. When performing their official duties, it may be necessary for officers to respond to the resistance of a person by exerting force and control over citizens to protect life, to protect property, to affect arrests, to execute court orders, or to perform other lawful duties.

It is the Department's policy for officers, when performing their official duties, to only use the degree of control or force reasonably necessary to accomplish their lawful objectives, and officers will never use force which is excessive. Under this policy, an officer's response to resistance is deemed to be reasonably necessary when it reasonably appears they cannot safely accomplish their lawful objectives by use of a lesser level of force. [1.3.1](#)

II. LEGAL AUTHORITY TO CARRY/USE WEAPONS

Kansas law enforcement officers, to include Overland Park Police Officers, derive their power to respond to resistance from a number of state laws; however, [K.S.A. 21-5227](#) clearly defines the authority to carry and use weapons while performing their duties. [1.2.2](#)

III. DEFINITIONS

Active Resistance: Resistance which is physical but not assaultive or threatening in nature. Examples would include clinging to objects, pulling away or running away.

AFID: Anti-Felon Identification tags located within the department issued air cartridges.

Aggressive Resistance: Resisting an officer in the lawful performance of his/her duty by threatening or assaultive behavior toward the officer or others.

Conducted Electrical Weapon (CEW): A non-deadly device issued by the Department, used to incapacitate an individual by discharging an electronic current causing Electro-Muscular Disruption (EMD) or to invoke a pain compliance response by discharging an electronic current to a localized area.

Custodial: defined as a person(s) who is under arrest, in police protective custody, or being involuntarily committed.

Conducted Electrical Weapon Cycle: One trigger press and release with a five (5) second deployment in either "Drive Stun" or "Probe" mode.

Excessive Force: Force that is greater than reasonably necessary.

"Felony Involving Great Bodily Harm": Is a felony involving actual or threatened infliction of Great Bodily Harm.

Great Bodily Harm: Injury that creates a substantial risk of death or causes serious permanent disfigurement, or results in long term loss or impairment of the functioning of any bodily member or organ. The term "Great Bodily Harm" is synonymous with terms Serious Bodily Injury, Great Bodily Injury, Serious Physical Injury, and Serious Physical Harm.

Deadly Force: Force which causes death or ²⁰⁰great bodily injury or which creates a degree of risk

a reasonable person would consider likely to cause death or great bodily injury and will be synonymous with Deadly Force.

Medical Only: Resistance which is physical and related to a medical condition only and not related to any type of arrest. The subject does not have the inherent ability to control their physical actions due to a medical condition.

Non-Deadly Force: Force not intended to cause death or Great Bodily Harm.

Non-Resistance: When no resistance occurs and precautionary force and verbal directions are given to seek compliance from a person to safely accomplish a lawful objective.

Officer-Involved Shooting: The intentional or unintentional discharge of a firearm by an officer, either as a participant or victim, in which a person is injured or killed, or the potential exists for criminal charges to be filed as a result of the discharge, such as aggravated assault. This would include shooting incidents that occur while an officer is Off-Duty.

Passive Resistance: Non-compliance with a lawful order of an officer including the person who remains limp, utilizes their own dead weight, remains in a prone position, or who expresses mere verbal disagreement not threatening to an officer or others.

Physical Control Methods: use of pain compliance techniques, joint or wrist locks, escort techniques, muscling/wrestling and pulling/pushing.

Police Service Dog (PSD): PSD engagement is defined as a bite.

Precautionary Force or Show of Force: Exhibiting or pointing a firearm, OC spray, ASP baton, extended range impact weapon, CEW to include the use of the “red dot”, or the use of a police canine, while giving verbal directions and seeking compliance from a person to safely accomplish a lawful objective.

Reasonably Necessary Force: Force an officer reasonably believes to be necessary to safely accomplish a lawful objective. It may only be used to the extent reasonably necessary in light of the circumstances confronting the officer. Reasonableness is determined by the officer’s view of the facts and circumstances based on their personal observations or facts and circumstances using reliable information, which would lead the officer to believe that a lesser degree of force would not safely accomplish the lawful objective.

Restraining Force: Is force which is necessary to overcome a person’s resistance to lawful arrest or to perform any other official duty.

Spark Test: A non-contact demonstration of the CEW’s ability to discharge electricity. This is conducted only when the cartridge has been removed from the device.

“Use of a Deadly Weapon”: Is the actual or threatened use of a deadly weapon.

WRAP: is considered a safe restraint system designed to prevent death or injuries.

IV. PROCEDURE 1.3.4

A. NON-DEADLY FORCE

The amount and level of non-deadly force used must be reasonable. A determination of reasonableness should be based on an assessment of the factors present, including but not limited to:

- The seriousness and nature of the offense
- The suspect's physical ability, mental competence and degree of resistance or violence toward the officer or others.
- Is physical control of a person is immediately necessary
- Can the situation be defused and handled without force
- Will the use of force escalate violence or create unreasonable risk of injury to the officer or other persons.

Non-deadly force may be used to:

- Protect the officer or another person from bodily harm
- Prevent persons from injuring themselves
- Effect and safely maintain lawful investigative stops, arrests and searches
- Overcome resistance to such stops; arrests or searches; and, to prevent escapes from custody
- Provide necessary control over persons in custody

Non-Deadly Force Techniques

Departmentally trained and authorized non-deadly force techniques are:

- Conducted Electrical Weapon (CEW)
- Oleoresin Capsicum (OC) Spray & powder
- Physical Control Methods – as defined
- (PPCT) defensive counter strikes
- Krav Maga
- ASP Baton
- Noise Flash Diversion Devices (NFDD)
- Engagement of a Police Service Dog
- Extended range impact weapon

Conducted Electrical Weapon (CEW)

The CEW will be carried in an approved holster on the officer's support side only, in "probe mode." Only Department approved and issued air cartridges will be used in the CEW. Only officers who have completed the annual departmentally approved training will be issued and allowed to use a CEW.

The CEW will not be used in potentially flammable or explosive environments; i.e. after an alcohol based OC spray exposure. Officer(s) will not use the CEW on a prisoner in a departmentally approved restraint device, unless he/she is an immediate threat to themselves or others.

The CEW will only be used to:

- Protect the officer or another person from bodily harm
- Prevent a person from injuring him or herself

- Overcoming aggressive resistance to lawful investigative stops, arrests or searches
Stop a vicious animal that presents a danger to the officer or public.

If practicable and does not put others at risk, officers should warn the person and other officers at the scene of the intended use of the CEW. No more than one officer at a time should intentionally activate a CEW against a person.

Officer(s) will evaluate a person's compliance after each CEW activation against him/her prior to additional activations. Officer(s) will not exceed combined activations of three (3) cycles in either "probe" or "drive stun" modes.

Officers are cautioned that there may be limitations on the effectiveness of the CEW and be prepared to transition to a different force option.

Pre-Deployment Procedure

Officers will conduct a daily "spark test" prior to the start of his/her work assignment to verify proper device operation. No additional "spark test" will be conducted without supervisory approval. Officers should conduct the "spark test" in front of his/her patrol car, weather permitting, during the initial vehicle video equipment check.

Post Deployment Procedures

It will be the officer's responsibility to ensure all post-deployment procedures are completed. Officers will monitor the affected person for breathing irregularities, level of consciousness and compliance. The person will be taken to the hospital. If officers reasonably believe the person upon whom the CEW was used exhibits any sign of medical distress, or is in need of medical treatment, aid will be rendered and emergency medical personnel will be called to the scene.

1.3.5

The person's medical condition will determine whether he/she will be transported by ambulance or by an officer to a medical facility.

Officer(s) will not refuse medical treatment for anyone who requests it.

A medical release form by the hospital is not required to lodge in the county jail as long as the information is verbally passed onto the county jail.

If the CEW is deployed by an Overland Park Court security officer he/she will contact OPPD Dispatch and request a police officer and police supervisor respond to the scene.

Oleoresin Capsicum (OC) Spray

If an officer is confronted by a person brandishing OC, MACE, CN, CS spray, etc. the officer will consider the totality of circumstances and use a level of force reasonably necessary to accomplish lawful objectives. Deadly Force can only be used in accordance with this policy.

If practicable, officers should warn the person and other officers of the intended use of the OC spray. Officers need to be aware there may be limitations on the effectiveness of OC and be prepared to transition to a different force option.

OC will not be used on a person who shows "passive resistance" to an officer or in the following situations:

- In a setting where panic could reasonably result
- When a risk of unreasonable injury to the person is created, such as temporarily blinding a person walking near oncoming traffic
- On a prisoner in a departmentally approved restraint device, unless they pose an immediate threat to themselves or others.

Post Deployment Procedures

Officers will frequently check the exposed person for indications of medical problems, until the person is released from the officer's custody. Officers will call for emergency medical assistance if any of the following is observed:

- Any unusual breathing difficulty
- Persistent gagging
- Loss of consciousness
- Profuse sweating
- Any other indication the person is in need of immediate medical care
- If the person requests medical assistance
- If the officer believes the affected person ingested OC spray into their mouth. 1.3.5

Officers will not refuse medical treatment for anyone who requests it.

Officer(s) will make notification verbally and in writing using the *Release Form* [Attachment A](#) when the exposed person is released to another law enforcement agency or other responsible person. If the arrested person is to be incarcerated in a facility, like the county jail, the officer will make verbal notification and present written authorization that the person may be incarcerated.

Additional Non-Deadly Use Of Force Techniques

Physical control methods, PPCT, Krav Maga, the ASP baton and Noise Flash Diversion Devices (NFDD) are authorized as non-deadly uses of force by officers who have received departmental training in such tactics. The techniques must be used pursuant to the training standards and in compliance with this policy. Appropriate aid must be rendered to those that are injured from the use of these techniques. 1.3.5

Only Department-issued and approved defensive instruments may be carried. Officers using instruments must have received Department-approved training and qualification, unless use of other tactics and/or instruments is reasonably necessary to protect the officer or third person from imminent injury or death.

A police service dog (PSD) engagement is considered a non-deadly use of force.

"*Hog-Tying*": or any technique requiring the connecting of feet and hands while the hands are behind a person's back is specifically prohibited.

Extended Range Impact Weapon

The extended range impact weapon is a shotgun and discharges non deadly munitions. It is intended to incapacitate an individual for a brief time in order for the person to be safely taken into custody or to prevent the person from causing great bodily harm to himself/herself or others.

Only departmentally-approved issued weapons and ammunition will be used, and only by trained or authorized officers, who have demonstrated proficiency in the use of the weapon.

Use of the extended range impact weapon will be applied according to the manufacturer's instructions and in conformity with training provided by the Department.

The extended range impact weapon may be used when it is objectively reasonable to:

- Control a person who is armed with a deadly weapon and is threatening suicide.
- Control a person who is about to commit suicide or inflict serious bodily injury upon himself. Disarm or disable a subject who is armed with a deadly weapon and is engaging in illegal or dangerous behavior.
- Prevent injuries to police or citizens or to prevent large-scale property destruction in crowd control or riot conditions.
- Control a violent subject or a subject threatening imminent violence.

Post Deployment Procedures

Once the scene is secured, persons who have been subjected to an extended range impact weapon will be transported to the nearest medical facility as soon as practical. Officers will monitor the affected person for breathing irregularities, level of consciousness and compliance. The person's medical condition will determine whether they are transported by ambulance or by an officer to the medical facility.

B. USE OF DEADLY FORCE [1.3.2](#)

An officer is justified in using deadly force only when the officer reasonably believes such force is necessary to:

- Protect the officer or another person from imminent danger of death great bodily harm.
- To prevent an arrest from being defeated by resistance or escape and the officer has probable cause to believe the person being arrested has committed or attempted to commit a felony involving great bodily harm and is attempting to escape by use of a deadly weapon.

Justification for the use of deadly force will be limited to the facts and circumstances known or perceived by the officer at the time the decision is made. Facts unknown to the officer will not be considered in later determinations.

Deadly force will be used only for the purpose of incapacitating a suspect. When using a firearm, officers will shoot at center-body mass for maximum incapacitating effectiveness and minimized danger to others. An officer may shoot at other than center-body mass if tactical considerations such as the taking of a hostage dictate otherwise, and it is necessary to protect the officer or others from serious bodily injury or death.

Prohibited Use of Deadly Force

Officers will not:

- Use deadly force to effect the arrest or prevent the escape of an unarmed, non-dangerous, fleeing felon.
- Discharge a firearm when it appears likely an innocent person may be injured, unless such discharge is immediately necessary to protect the officer or other person from imminent death or great bodily harm.
- Discharge a firearm at or from a moving vehicle except in self defense or defense of another and when the suspect is using deadly force.
- Fire warning shots. [1.3.3](#)

C. ADMINISTRATIVE REPORTING REQUIREMENTS [1.3.6 \(B\)\(C\)\(D\)](#)

The following on-duty incidents will require a Response to Resistance administrative investigative report "Long Form":

- Deadly force
- Use of extended range impact weapon
- Use of defensive instruments (Baton, OC, CEW)
- Use of PPCT defensive counter strikes or Krav Maga
- Any application of force involving injury or claim of injury

**Supervisors involved in the above situations will not handle the RTR administrative investigative report. Their supervisor or another field supervisor will handle the administrative investigation.*

The incidents below require a RTR administrative "Short Form" report:

- Physical Control Methods – as defined
- Precautionary or show of force with firearm, defensive instrument or use of police service dog.

Supervisor Duties

Supervisors will respond to the scene if the incident involves:

- Deadly force
- Use of extended range impact weapon
- Use of defensive instrument (Baton, OC, CEW, engagement of PSD)
- Use of PPCT defensive counter-strikes or Krav Maga
- Injury or claim of injury

Supervisors of TFOs will communicate with the TFO to determine if a response to the scene is necessary.

- Complete an administrative investigative RTR report (short or long form)
- Conduct a thorough investigation
- Download data, ensure AFID collection and proper packaging in the event of an ECD deployment
- Communicate to the Division Commander any policy concerns created by the response to resistance incident.

D. REVIEWING REPORTS 1.3.7

The response to resistance “long form” report will be forwarded through the Chain of Command to the Division Commander as soon as possible. Certain circumstances may dictate a shorter or extended deadline for completion as determined by the section manager or shift Watch Commander.

The section manager or shift Watch Commander will review the response to resistance incident and all related reports to determine if the incident was in compliance with policy. If it is determined to be within policy, the RTR will be closed within 30 days of the incident.

Any violations of policy will require a documented recommendation of discipline to be reviewed by the Member’s section manager or shift Watch Commander. Recommended discipline that includes suspensions must be reviewed by the Division Commander. Outside of special circumstances, determined by the Division Commander, recommended discipline will be reviewed and served within 14 days of the incident’s date.

Early Warning Intervention

Early warning reports will be evaluated by the Internal Affairs Section, concerns will be forwarded to the officer’s chain of command for review.

E. FIREARMS DISCHARGE OR USE OF DEADLY FORCE 1.3.6. (A)

The following procedures will be implemented when an officer uses deadly force which injures a person, or when an officer discharges a firearm for other than target practice, hunting, ballistics examinations or destroying an animal.

After an officer uses deadly force or discharges a firearm either intentionally or unintentionally, when the situation permits and there is a reasonable belief it is safe to do so, the officer will:

- Check the physical condition of any injured person, render first aid when appropriate and request necessary emergency medical aid. 1.3.5
- Report the incident to a supervisor
- Notify police dispatchers about the incident and location
- Protect his/her weapon for later examination. Do not load or unload the weapon used in the discharge and surrender said weapon to an appropriate Investigator.
- Prepare a detailed report of the incident as directed by a supervisor or an OISIT
Remain available at all times for official interviews and statements regarding the case.

Upon notification of a firearms discharge, or potential officer involved shooting, dispatchers will send medical aid to the scene and notify the Watch Commander, or designee of the incident. Dispatchers will make other notifications as directed by the Watch Commander, or designee.

Upon notification of a firearm discharge, or a potential officer involved shooting, the Watch Commander, or a designee, will:

- Ensure the scene is secured and protected.
- Notify the Division Commander, ensure the Chief of Police and appropriate Bureau Commanders are notified.

The Chief of Police or Bureau Commander will assign the Division Commanders to take charge of and conduct a preliminary investigation of the incident.

In situations involving personal injuries or possible criminal charges, the Division Commander will consult with the Chief of Police or appropriate Bureau Commander to determine the need to activate the JO CO DA's OISIT.

Board of Review

The purpose of the board of review is to aid continuing evaluation of policy, procedure and training.

A board of review will not be convened until the District Attorney is presented with a pending criminal file and determines no charges will be filed or rules there is no criminal liability; or until the internal administrative investigation has been completed.

Issue and Training of Written Directive 1.3.12

Prior to being authorized to carry lethal and less lethal weapons, all Members are required to read, review and receive instruction on the most current version of this written directive, [SOP 2330, Response to Resistance](#) which is stored in the Department's electronic, written directive's system. After reading, reviewing and receiving instruction, Members are required to electronically sign acknowledgement of receipt and instruction of this written directive. All OPPD written directives are loaded into the electronic written directives system, and electronic signatures are tracked and maintained in the same system. Members are encouraged to frequently review this written directive either on the written directives system, or may print a copy.

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CALEA references:

1.2.2
1.3.1
1.3.2
1.3.3
1.3.4
1.3.5
1.3.6 (A)(B)(C)(D)
1.3.7
1.3.12

Case Number: _____

OVERLAND PARK POLICE DEPARTMENT
SIGNATURE PAGE ATTACHMENT**Medical Information and Consent**

1. Are you presently ill or injured? _____. If so, state the nature of illness(es)/injury (ies) _____.
2. Are you taking medication? _____. If so, list the medication(s) and the prescribing doctor's name(s):

3. When and why were you last treated or seen by a doctor?

I understand that emergency medical and dental treatment is available while I am being detained by the Overland Park Police Department. If I should require emergency treatment, I hereby consent to such treatment at a medical facility designated by the City of Overland Park.

Consenting Person's Signature: _____ Printed Name: _____

Witnessing Officer's Signature: _____

Custody Release Form

I hereby assume responsibility for _____ and agree to transport him/her directly home.

☐ _____ has been exposed to an Electronic Control Device.

Receiving Person's Signature: _____ Date: _____

Receiving Person's Printed Name: _____ Telephone No: _____

Address: _____ Witnessing Officer's Signature: _____

Health Hazards for OC Spray

Signs & Symptoms of Exposure: Ingredients cause irritation through all routes of entry. Repeated contact may cause Dermatitis. Ingestion may cause nausea, vomiting and/or diarrhea.

Medical Conditions Generally Aggravated by Exposure: May cause more severe, temporary, effects on those persons who are asthmatics or suffer from emphysema.

Emergency and First Aid Procedures: Provide fresh air, irrigate with copious amounts of cool water. Obtain medical advice if symptoms persist.

Routes of Entry:

1. *Inhalation* - Provide fresh air.
2. *Eyes* - Irrigate with cool water at least 15 minutes, or until relieved.
3. *Skin* - Flush with cool water. Wash with mild soap and water.
4. *Ingestion* - Rinse with water. Ingest milk or water. Obtain medical advice immediately.

Case Number: _____

Person Exposed to OC Spray: _____

OVERLAND PARK POLICE DEPARTMENT
SIGNATURE PAGE ATTACHMENT

Vehicle Liability and Tow Waiver

Vehicle Description: Color: _____ Year: _____ Make: _____ Model: _____ Style: _____

License Number: _____ State: _____ Year: _____

Vehicle Condition: _____ Vehicle Location: _____

The above-described vehicle has been left at the above-listed location with my permission. By signing this form, I am releasing the City of Overland Park, Kansas, its Officers and employees from any and all claims of liability, including, but not limited to, theft or damage to the above-listed vehicle and/or any contents contained therein.

Signature: _____ Date: _____

Witnessing Officer's Signature: _____

Missing Persons Attachment

Missing Person's Name: _____

Reporting Person's Name: _____

My signature verifies I have reported the above-listed person as a missing person to the Overland Park Police Department

Reporting Person's Signature: _____ Date: _____

SUPERVISOR GUIDELINES FOR AIM REPORTING

RESPONSE TO RESISTANCE (SHORT FORM):

- Only used for Precautionary Force and Physical Control Incidents
- Complete all applicable windows (check boxes)
- Enter the names and information of the involved officer(s), individual(s) and witnesses, if available or known
- No narrative is required for the Response to Resistance Short Form
- Attach I/Leads PDF report/or TFO memo.
- No other attachments are required (i.e. witness statements, recordings etc.)

Tracking:

- When finished, the supervisor will check the appropriate box for their recommendation.
- The supervisor will track the response to resistance report to the supervisor's section manager or shift Watch Commander within three days.
- If a policy violation is noted follow the investigative and tracking guidelines of the Long form.

RESPONSE TO RESISTANCE (LONG FORM):

- Use for all other Response to Resistance incidents
- Complete all applicable windows
- Enter the names and personal data of those involved officer(s), individuals and witnesses, if available or known
- Include one summary of the investigation/incident under the notes section.

Summarize (within the notes section):

- Core transaction
- A summary description of what each officer did during the response to resistance. (It is not necessary to document a summary under each officer's individual note section.)
- Audio and video availability along with the times in order to assist with the review
- Note of verbal or written witness statements
- Supervisor opinion of policy compliance

Exhibits:

- Attach PDF I/Leads report
- Attach available witness statements to the AIM report not Share Point

Tracking:

- When finished, the supervisor will check the appropriate box for their recommendation and track the report.
- The supervisor will track the response to resistance report to the supervisor's section manager or shift Watch Commander within three days. (Although certain circumstances may dictate a shorter deadline for completion as determined by the section manager or shift Watch Commander.)
- If the supervisor's section manager or shift Watch Commander is on extended leave, track the report to the on duty section manager or shift Watch Commander.
- Within five scheduled working days the section manager or shift Watch Commander will review the response to resistance incident and all related reports to determine if the incident was in compliance with policy.

"No Policy Violation" - The response to resistance will be closed.

"Policy Violation" - Any violations of policy will require a documented recommendation of discipline to be reviewed by the Member's section manager or shift Watch Commander.

Recommended discipline. Outside of special circumstances, determined by the Division Commander, recommended discipline will be reviewed and served within 14 days of the incident's date.



OVERLAND PARK POLICE DEPARTMENT STANDARD OPERATING PROCEDURE

NUMBER: 2330
TOPIC: RESPONSE TO RESISTANCE
EFFECTIVE DATE: 08/31/2016
SUPERCEDES: 03/31/2014

SIGNATURE: /s/ Frank Donchez /s/ Michael Ernst
 Chief of Police Bureau Commander

- I. PURPOSE**
- II. LEGAL AUTHORITY TO CARRY/USE WEAPON**
- III. DEFINITIONS**
- IV. PROCEDURE**
 - A. NON DEADLY FORCE AND TECHNIQUES
 - B. DEADLY FORCE
 - C. REPORTING REQUIREMENTS
 - D. REVIEWING REPORTS
 - E. FIREARMS DISCHARGE OR USE OF DEADLY FORCE

ATTACHMENT A

ATTACHMENT B

CALEA references: See below

I. PURPOSE

The value of human life in our society is immeasurable. Police officers have been delegated the responsibility to protect life and property and to apprehend criminal offenders. The apprehension of criminal offenders and the duty to protect property and the responsibility to control and process persons in custody must at all times be subservient to the duty to protect life. An officer's responsibility for protecting life includes protecting his or her own life.

The purpose of this procedure is to protect the sanctity of human life while effectively enforcing the law, and it encompasses federal and state law on the subject of use of deadly force.

This procedure applies to all OPPD commissioned Law Enforcement Officers, all commissioned OP Court Security officers, and all OPFD Fire Investigators certified by the Kansas State Fire Marshall. Unless otherwise identified herein, these individuals will collectively be referred to as "officers."

The Chief of Police, the Presiding Judge and the Fire Chief will ensure those officers under their respective authority and supervision will comply with the provisions of this procedure. Further, the Presiding Judge and Fire Chief will provide the Chief of Police with written verification that all officers under their supervision are complying with the provisions of this procedure, to include, but not be limited to training, conduct, supervision, and review of violations.

Legal duties and responsibilities are imposed upon officers as a means to maintain order in the City and society as a whole. Professional performance of these duties and responsibilities requires reasonable and impartial enforcement of laws and the protection of the legal rights of all persons. When performing their official duties, it may be necessary for officers to respond to the resistance of a person by exerting force and control over citizens to protect life, to protect property, to affect arrests, to execute court orders, or to perform other lawful duties.

It is the Department's policy for officers, when performing their official duties, to only use the degree of control or force reasonably necessary to accomplish their lawful objectives, and officers will never use force which is excessive. Under this policy, an officer's response to resistance is deemed to be reasonably necessary when it reasonably appears they cannot safely accomplish their lawful objectives by use of a lesser level of force. **1.3.1**

II. LEGAL AUTHORITY TO CARRY/USE WEAPONS

Kansas law enforcement officers, to include Overland Park Police Officers, derive their power to respond to resistance from a number of state laws; however, [K.S.A. 21-5227](#) clearly defines the authority to carry and use weapons while performing their duties. **1.2.2**

III. DEFINITIONS

Active Resistance: Resistance which is physical but not assaultive or threatening in nature. Examples would include clinging to objects, pulling away or running away.

AFID: Anti-Felon Identification tags located within the department issued air cartridges.

Aggressive Resistance: Resisting an officer in the lawful performance of his/her duty by threatening or assaultive behavior toward the officer or others.

Conducted Electrical Weapon (CEW): A non-deadly device issued by the Department, used to incapacitate an individual by discharging an electronic current causing Electro-Muscular Disruption (EMD) or to invoke a pain compliance response by discharging an electronic current to a localized area.

Custodial: defined as a person(s) who is under arrest, in police protective custody, or being involuntarily committed.

Conducted Electrical Weapon Cycle: One trigger press and release with a five (5) second deployment in either "Drive Stun" or "Probe" mode.

Excessive Force: Force that is greater than reasonably necessary.

"Felony Involving Great Bodily Harm": Is a felony involving actual or threatened infliction of Great Bodily Harm.

Great Bodily Harm: Injury that creates a substantial risk of death or causes serious permanent disfigurement, or results in long term loss or impairment of the functioning of any bodily member or organ. The term "Great Bodily Harm" is synonymous with terms Serious Bodily Injury, Great Bodily Injury, Serious Physical Injury, and Serious Physical Harm.

Deadly Force: Force which causes death or ²¹³great bodily injury or which creates a degree of risk

a reasonable person would consider likely to cause death or great bodily injury and will be synonymous with Deadly Force.

Medical Only: Resistance which is physical and related to a medical condition only and not related to any type of arrest. The subject does not have the inherent ability to control their physical actions due to a medical condition.

Non-Deadly Force: Force not intended to cause death or Great Bodily Harm.

Non-Resistance: When no resistance occurs and precautionary force and verbal directions are given to seek compliance from a person to safely accomplish a lawful objective.

Officer-Involved Shooting: The intentional or unintentional discharge of a firearm by an officer, either as a participant or victim, in which a person is injured or killed, or the potential exists for criminal charges to be filed as a result of the discharge, such as aggravated assault. This would include shooting incidents that occur while an officer is Off-Duty.

Passive Resistance: Non-compliance with a lawful order of an officer including the person who remains limp, utilizes their own dead weight, remains in a prone position, or who expresses mere verbal disagreement not threatening to an officer or others.

Physical Control Methods: use of pain compliance techniques, joint or wrist locks, escort techniques, muscling/wrestling and pulling/pushing.

Police Service Dog (PSD): PSD engagement is defined as a bite.

Precautionary Force or Show of Force: Exhibiting or pointing a firearm, OC spray, ASP baton, extended range impact weapon, CEW to include the use of the “red dot”, or the use of a police canine, while giving verbal directions and seeking compliance from a person to safely accomplish a lawful objective.

Reasonably Necessary Force: Force an officer reasonably believes to be necessary to safely accomplish a lawful objective. It may only be used to the extent reasonably necessary in light of the circumstances confronting the officer. Reasonableness is determined by the officer’s view of the facts and circumstances based on their personal observations or facts and circumstances using reliable information, which would lead the officer to believe that a lesser degree of force would not safely accomplish the lawful objective.

Restraining Force: Is force which is necessary to overcome a person’s resistance to lawful arrest or to perform any other official duty.

Spark Test: A non-contact demonstration of the CEW’s ability to discharge electricity. This is conducted only when the cartridge has been removed from the device.

“Use of a Deadly Weapon”: Is the actual or threatened use of a deadly weapon.

WRAP: is considered a safe restraint system designed to prevent death or injuries.

IV. PROCEDURE 1.3.4

A. NON-DEADLY FORCE

The amount and level of non-deadly force used must be reasonable. A determination of reasonableness should be based on an assessment of the factors present, including but not limited to:

- The seriousness and nature of the offense
- The suspect's physical ability, mental competence and degree of resistance or violence toward the officer or others.
- Is physical control of a person is immediately necessary
- Can the situation be defused and handled without force
- Will the use of force escalate violence or create unreasonable risk of injury to the officer or other persons.

Non-deadly force may be used to:

- Protect the officer or another person from bodily harm
- Prevent persons from injuring themselves
- Effect and safely maintain lawful investigative stops, arrests and searches
- Overcome resistance to such stops; arrests or searches; and, to prevent escapes from custody
- Provide necessary control over persons in custody

Non-Deadly Force Techniques

Departmentally trained and authorized non-deadly force techniques are:

- Conducted Electrical Weapon (CEW)
- Oleoresin Capsicum (OC) Spray & powder
- Physical Control Methods – as defined
- (PPCT) defensive counter strikes
- Krav Maga
- ASP Baton
- Noise Flash Diversion Devices (NFDD)
- Engagement of a Police Service Dog
- Extended range impact weapon

Conducted Electrical Weapon (CEW)

The CEW will be carried in an approved holster on the officer's support side only, in "probe mode." Only Department approved and issued air cartridges will be used in the CEW. Only officers who have completed the annual departmentally approved training will be issued and allowed to use a CEW.

The CEW will not be used in potentially flammable or explosive environments; i.e. after an alcohol based OC spray exposure. Officer(s) will not use the CEW on a prisoner in a departmentally approved restraint device, unless he/she is an immediate threat to themselves or others.

The CEW will only be used to:

- Protect the officer or another person from bodily harm

- Prevent a person from injuring him or herself
- Overcoming aggressive resistance to lawful investigative stops, arrests or searches
- Stop a vicious animal that presents a danger to the officer or public.

If practicable and does not put others at risk, officers should warn the person and other officers at the scene of the intended use of the CEW. No more than one officer at a time should intentionally activate a CEW against a person.

Officer(s) will evaluate a person's compliance after each CEW activation against him/her prior to additional activations. Officer(s) will not exceed combined activations of three (3) cycles in either "probe" or "drive stun" modes.

Officers are cautioned that there may be limitations on the effectiveness of the CEW and be prepared to transition to a different force option.

Pre-Deployment Procedure

Officers will conduct a daily "spark test" prior to the start of his/her work assignment to verify proper device operation. No additional "spark test" will be conducted without supervisory approval. Officers should conduct the "spark test" in front of his/her patrol car, weather permitting, during the initial vehicle video equipment check.

Post Deployment Procedures

It will be the officer's responsibility to ensure all post-deployment procedures are completed. Officers will monitor the affected person for breathing irregularities, level of consciousness and compliance. The person will be taken to the hospital. If officers reasonably believe the person upon whom the CEW was used exhibits any sign of medical distress, or is in need of medical treatment, aid will be rendered and emergency medical personnel will be called to the scene.

1.3.5

The person's medical condition will determine whether he/she will be transported by ambulance or by an officer to a medical facility.

Officer(s) will not refuse medical treatment for anyone who requests it.

A medical release form by the hospital is not required to lodge in the county jail as long as the information is verbally passed onto the county jail.

If the CEW is deployed by an Overland Park Court security officer he/she will contact OPPD Dispatch and request a police officer and police supervisor respond to the scene.

Oleoresin Capsicum (OC) Spray

If an officer is confronted by a person brandishing OC, MACE, CN, CS spray, etc. the officer will consider the totality of circumstances and use a level of force reasonably necessary to accomplish lawful objectives. Deadly Force can only be used in accordance with this policy.

If practicable, officers should warn the person and other officers of the intended use of the OC spray. Officers need to be aware there may be limitations on the effectiveness of OC and be prepared to transition to a different force option.

OC will not be used on a person who shows "passive resistance" to an officer or in the following situations:

- In a setting where panic could reasonably result
- When a risk of unreasonable injury to the person is created, such as temporarily blinding a person walking near oncoming traffic
- On a prisoner in a departmentally approved restraint device, unless they pose an immediate threat to themselves or others.

Post Deployment Procedures

Officers will frequently check the exposed person for indications of medical problems, until the person is released from the officer's custody. Officers will call for emergency medical assistance if any of the following is observed:

- Any unusual breathing difficulty
- Persistent gagging
- Loss of consciousness
- Profuse sweating
- Any other indication the person is in need of immediate medical care
- If the person requests medical assistance
- If the officer believes the affected person ingested OC spray into their mouth. **1.3.5**

Officers will not refuse medical treatment for anyone who requests it.

Officer(s) will make notification verbally and in writing using the *Release Form* [Attachment A](#) when the exposed person is released to another law enforcement agency or other responsible person. If the arrested person is to be incarcerated in a facility, like the county jail, the officer will make verbal notification and present written authorization that the person may be incarcerated.

Additional Non-Deadly Use Of Force Techniques

Physical control methods, PPCT, Krav Maga, the ASP baton and Noise Flash Diversion Devices (NFDD) are authorized as non-deadly uses of force by officers who have received departmental training in such tactics. The techniques must be used pursuant to the training standards and in compliance with this policy. Appropriate aid must be rendered to those that are injured from the use of these techniques. **1.3.5**

Only Department-issued and approved defensive instruments may be carried. Officers using instruments must have received Department-approved training and qualification, unless use of other tactics and/or instruments is reasonably necessary to protect the officer or third person from imminent injury or death.

A police service dog (PSD) engagement is considered a non-deadly use of force.

"*Hog-Tying*": or any technique requiring the connecting of feet and hands while the hands are behind a person's back is specifically prohibited.

Extended Range Impact Weapon

The extended range impact weapon is a shotgun and discharges non deadly munitions. It is intended to incapacitate an individual for a brief time in order for the person to be safely taken into custody or to prevent the person from causing great bodily harm to himself/herself or others.

Only departmentally-approved issued weapons and ammunition will be used, and only by trained or authorized officers, who have demonstrated proficiency in the use of the weapon.

Use of the extended range impact weapon will be applied according to the manufacturer's instructions and in conformity with training provided by the Department.

The extended range impact weapon may be used when it is objectively reasonable to:

- Control a person who is armed with a deadly weapon and is threatening suicide.
- Control a person who is about to commit suicide or inflict serious bodily injury upon himself. Disarm or disable a subject who is armed with a deadly weapon and is engaging in illegal or dangerous behavior.
- Prevent injuries to police or citizens or to prevent large-scale property destruction in crowd control or riot conditions.
- Control a violent subject or a subject threatening imminent violence.

Post Deployment Procedures

Once the scene is secured, persons who have been subjected to an extended range impact weapon will be transported to the nearest medical facility as soon as practical. Officers will monitor the affected person for breathing irregularities, level of consciousness and compliance. The person's medical condition will determine whether they are transported by ambulance or by an officer to the medical facility.

B. USE OF DEADLY FORCE

An officer is justified in using deadly force only when the officer reasonably believes such force is necessary to:

- Protect the officer or another person from imminent danger of death great bodily harm.
- To prevent an arrest from being defeated by resistance or escape and the officer has probable cause to believe the person being arrested has committed or attempted to commit a felony involving great bodily harm and is attempting to escape by use of a deadly weapon.

Justification for the use of deadly force will be limited to the facts and circumstances known or perceived by the officer at the time the decision is made. Facts unknown to the officer will not be considered in later determinations.

Deadly force will be used only for the purpose of incapacitating a suspect. When using a firearm, officers will shoot at center-body mass for maximum incapacitating effectiveness and minimized danger to others. An officer may shoot at other than center-body mass if tactical considerations such as the taking of a hostage dictate otherwise, and it is necessary to protect the officer or others from serious bodily injury or death.

Prohibited Use of Deadly Force

Officers will not:

- Use deadly force to effect the arrest or prevent the escape of an unarmed, non-dangerous, fleeing felon.
- Discharge a firearm when it appears likely an innocent person may be injured, unless such discharge is immediately necessary to protect the officer or other person from imminent death or great bodily harm.
- Discharge a firearm at or from a moving vehicle except in self defense or defense of another and when the suspect is using deadly force.
- Fire warning shots. **1.3.3**

C. ADMINISTRATIVE REPORTING REQUIREMENTS **1.3.6 (B), (C), (D)**

The following on-duty incidents will require a Response to Resistance administrative investigative report "Long Form":

- Deadly force
- Use of extended range impact weapon
- Use of defensive instruments (Baton, OC, CEW)
- Use of PPCT defensive counter strikes or Krav Maga
- Any application of force involving injury or claim of injury

**Supervisors involved in the above situations will not handle the RTR administrative investigative report. Their supervisor or another field supervisor will handle the administrative investigation.*

The incidents below require a RTR administrative "Short Form" report:

- Physical Control Methods – as defined
- Precautionary or show of force with firearm, defensive instrument or use of police service dog.

Supervisor Duties

Supervisors will respond to the scene if the incident involves:

- Deadly force
- Use of extended range impact weapon
- Use of defensive instrument (Baton, OC, CEW, engagement of PSD)
- Use of PPCT defensive counter-strikes or Krav Maga
- Injury or claim of injury

Supervisors of TFOs will communicate with the TFO to determine if a response to the scene is necessary.

- Complete an administrative investigative RTR report (short or long form)
- Conduct a thorough investigation
- Download data, ensure AFID collection and proper packaging in the event of an ECD deployment
- Communicate to the Division Commander any policy concerns created by the response to resistance incident.

D. REVIEWING REPORTS 1.3.7

The response to resistance “long form” report will be forwarded through the Chain of Command to the Division Commander as soon as possible. Certain circumstances may dictate a shorter or extended deadline for completion as determined by the section manager or shift Watch Commander.

The section manager or shift Watch Commander will review the response to resistance incident and all related reports to determine if the incident was in compliance with policy. If it is determined to be within policy, the RTR will be closed within 30 days of the incident.

Any violations of policy will require a documented recommendation of discipline to be reviewed by the member’s section manager or shift Watch Commander. Recommended discipline that includes suspensions must be reviewed by the Division Commander. Outside of special circumstances, determined by the Division Commander, recommended discipline will be reviewed and served within 14 days of the incident’s date.

Early Warning Intervention

Early warning reports will be evaluated by the Internal Affairs Section, concerns will be forwarded to the officer’s chain of command for review.

E. FIREARMS DISCHARGE OR USE OF DEADLY FORCE 1.3.6, (A)

The following procedures will be implemented when an officer uses deadly force which injures a person, or when an officer discharges a firearm for other than target practice, hunting, ballistics examinations or destroying an animal.

After an officer uses deadly force or discharges a firearm either intentionally or unintentionally, when the situation permits and there is a reasonable belief it is safe to do so, the officer will:

- Check the physical condition of any injured person, render first aid when appropriate and request necessary emergency medical aid. 1.3.5
- Report the incident to a supervisor
- Notify police dispatchers about the incident and location
- Protect his/her weapon for later examination. Do not load or unload the weapon used in the discharge and surrender said weapon to an appropriate Investigator.
- Prepare a detailed report of the incident as directed by a supervisor or an OISIT
Remain available at all times for official interviews and statements regarding the case.

Upon notification of a firearms discharge, or potential officer involved shooting, dispatchers will send medical aid to the scene and notify the Watch Commander, or designee of the incident. Dispatchers will make other notifications as directed by the Watch Commander, or designee.

Upon notification of a firearm discharge, or a potential officer involved shooting, the Watch Commander, or a designee, will:

- Ensure the scene is secured and protected.
- Notify the Division Commander, ensure the Chief of Police and appropriate Bureau Commanders are notified.

The Chief of Police or Bureau Commander will assign the Division Commanders to take charge of and conduct a preliminary investigation of the incident.

In situations involving personal injuries or possible criminal charges, the Division Commander will consult with the Chief of Police or appropriate Bureau Commander to determine the need to activate the JO CO DA's OISIT.

Board of Review

The purpose of the board of review is to aid continuing evaluation of policy, procedure and training.

A board of review will not be convened until the District Attorney is presented with a pending criminal file and determines no charges will be filed or rules there is no criminal liability; or until the internal administrative investigation has been completed.

Origin Date: 01/18/2008
Revision Date: 08/04/2008
Revision Date: 09/09/2009
Revision Date: 03/31/2014
Revision Date: 08/31/2016

CALEA references:

1.2.2
1.3.1
1.3.2
1.3.3
1.3.4
1.3.5
1.3.6 (A), (B), (C), (D)
1.3.7

THIS INFORMATION IS RESTRICTED AS TO USE AND DISSEMINATION.
CIVIL AND CRIMINAL PENALTIES EXIST FOR MISUSE.
COMPLETENESS AND ACCURACY EXPIRES IN 90 DAYS.
Copied to: Mark Schmid
OPPD #918
KORA Request
5/11/2018 8:28 AM

Case Number: _____

OVERLAND PARK POLICE DEPARTMENT
SIGNATURE PAGE ATTACHMENT**Medical Information and Consent**

1. Are you presently ill or injured? _____. If so, state the nature of illness(es)/injury (ies) _____.
2. Are you taking medication? _____. If so, list the medication(s) and the prescribing doctor's name(s):

3. When and why were you last treated or seen by a doctor?

I understand that emergency medical and dental treatment is available while I am being detained by the Overland Park Police Department. If I should require emergency treatment, I hereby consent to such treatment at a medical facility designated by the City of Overland Park.

Consenting Person's Signature: _____ Printed Name: _____

Witnessing Officer's Signature: _____

Custody Release Form

I hereby assume responsibility for _____ and agree to transport him/her directly home.

☐ _____ has been exposed to an Electronic Control Device.

Receiving Person's Signature: _____ Date: _____

Receiving Person's Printed Name: _____ Telephone No: _____

Address: _____ Witnessing Officer's Signature: _____

Health Hazards for OC Spray

Signs & Symptoms of Exposure: Ingredients cause irritation through all routes of entry. Repeated contact may cause Dermatitis. Ingestion may cause nausea, vomiting and/or diarrhea.

Medical Conditions Generally Aggravated by Exposure: May cause more severe, temporary, effects on those persons who are asthmatics or suffer from emphysema.

Emergency and First Aid Procedures: Provide fresh air, irrigate with copious amounts of cool water. Obtain medical advice if symptoms persist.

Routes of Entry:

1. *Inhalation* - Provide fresh air.
2. *Eyes* - Irrigate with cool water at least 15 minutes, or until relieved.
3. *Skin* - Flush with cool water. Wash with mild soap and water.
4. *Ingestion* - Rinse with water. Ingest milk or water. Obtain medical advice immediately.

Case Number: _____ 222

Person Exposed to OC Spray: _____

OVERLAND PARK POLICE DEPARTMENT
SIGNATURE PAGE ATTACHMENT

Vehicle Liability and Tow Waiver

Vehicle Description: Color: _____ Year: _____ Make: _____ Model: _____ Style: _____

License Number: _____ State: _____ Year: _____

Vehicle Condition: _____ Vehicle Location: _____

The above-described vehicle has been left at the above-listed location with my permission. By signing this form, I am releasing the City of Overland Park, Kansas, its Officers and employees from any and all claims of liability, including, but not limited to, theft or damage to the above-listed vehicle and/or any contents contained therein.

Signature: _____ Date: _____

Witnessing Officer's Signature: _____

Missing Persons Attachment

Missing Person's Name: _____

Reporting Person's Name: _____

My signature verifies I have reported the above-listed person as a missing person to the Overland Park Police Department

Reporting Person's Signature: _____ Date: _____

SUPERVISOR GUIDELINES FOR AIM REPORTING

RESPONSE TO RESISTANCE (SHORT FORM):

- Only used for Precautionary Force and Physical Control Incidents
- Complete all applicable windows (check boxes)
- Enter the names and information of the involved officer(s), individual(s) and witnesses, if available or known
- No narrative is required for the Response to Resistance Short Form
- Attach I/Leads PDF report/or TFO memo.
- No other attachments are required (i.e. witness statements, recordings etc.)

Tracking:

- When finished, the supervisor will check the appropriate box for their recommendation.
- The supervisor will track the response to resistance report to the supervisor's section manager or shift Watch Commander within three days.
- If a policy violation is noted follow the investigative and tracking guidelines of the Long form.

RESPONSE TO RESISTANCE (LONG FORM):

- Use for all other Response to Resistance incidents
- Complete all applicable windows
- Enter the names and personal data of those involved officer(s), individuals and witnesses, if available or known
- Include one summary of the investigation/incident under the notes section.

Summarize (within the notes section):

- Core transaction
- A summary description of what each officer did during the response to resistance. (It is not necessary to document a summary under each officer's individual note section.)
- Audio and video availability along with the times in order to assist with the review
- Note of verbal or written witness statements
- Supervisor opinion of policy compliance

Exhibits:

- Attach PDF I/Leads report
- Attach available witness statements to the AIM report not Share Point

Tracking:

- When finished, the supervisor will check the appropriate box for their recommendation and track the report.
- The supervisor will track the response to resistance report to the supervisor's section manager or shift Watch Commander within three days. (Although certain circumstances may dictate a shorter deadline for completion as determined by the section manager or shift Watch Commander.)
- If the supervisor's section manager or shift Watch Commander is on extended leave, track the report to the on duty section manager or shift Watch Commander.
- Within five scheduled working days the section manager or shift Watch Commander will review the response to resistance incident and all related reports to determine if the incident was in compliance with policy.

"No Policy Violation" - The response to resistance will be closed.

"Policy Violation" - Any violations of policy will require a documented recommendation of discipline to be reviewed by the member's section manager or shift Watch Commander.

Recommended discipline. Outside of special circumstances, determined by the Division Commander, recommended discipline will be reviewed and served within 14 days of the incident's date.